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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-220

PHELPS DODGE CORPORATION,
Petitioner,

v.

AFL-CIO JOINT NEGOTIATING COMMITTEE
for PHELPS DODGE CORPORATION, *et al*

and

THE NATIONAL LABOR RELATIONS BOARD,
Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Third Circuit

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on May 9, 1972.

OPINIONS BELOW

The original opinion of the court of appeals was filed March 31, 1972. Thereafter on May 25, 1972, it was

modified. It is reported as modified at 459 F.2d 374 (3rd Cir. 1972) and is found in the Appendix, *infra*, pp. A-6 - A-14. The decision and order of the National Labor Relations Board (the Board) are reported at 184 NLRB No. 106 and are found in the Appendix *infra*, pp. A-14 - A-30.

JURISDICTION

The judgment of the court of appeals (the Appendix *infra*, pp. A-4 - A-5) was entered on May 9, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Part V, Rule 19 of the Revised Rules of this Court.

QUESTION PRESENTED

Can a coalition of labor unions representing employees in bargaining units of an employer engaged in mining, milling and smelting operations in Arizona lawfully condition settlement of negotiations for such operations upon simultaneous and satisfactory settlement of contracts in other bargaining units in refining and manufacturing subsidiary corporations of the employer at locations in New York, Arkansas and Texas?

STATUTE INVOLVED

The pertinent statutory provision is 29 U.S.C.A. §158 (b)(3), Section 8(b)(3) of the National Labor Relations Act, As Amended, (The Act) which reads as follows:

> "(b) It shall be an unfair labor practice for a labor organization or its agents –
>
> . . . .
>
> . . . .

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of Section 159(a) of this title;
. . . ."

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Phelps Dodge is engaged in the mining, concentrating and smelting of copper ores at its Western Operations in four locations in Arizona. Copper anodes, which are shipped to refineries of the Phelps Dodge Refining Corporation (PDRC), a wholly owned subsidiary of Phelps Dodge, are the final product of these operations.[1] (J.A. 9, 10, 12). After refining, the copper is shipped to fabricating plants of Phelps Dodge Industries (PDI), another wholly owned subsidiary of Phelps Dodge, or is sold to non-Phelps Dodge customers. (J.A. 155).

PDRC operates a refinery at El Paso, Texas, (TXD 6; J.A., 154). Among the several subsidiary corporations of PDI are Phelps Dodge Copper Products Corporation (PDCPC), which has among its plants four Yonkers, New York, insulated cable plants (also known as the Habirshaw Division), a telephone cable plant at Fordyce, Arkansas, and a plant at Lincoln, Rhode Island, known as MacKenzie-Walton, Inc., which manufactures copper tubing. (TXD 4, J.A. 129-131).

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[1] The Trial Examiners' decision will be cited "TXD". J.A. refers to the Joint Appendix filed with the court of appeals. A copy has been filed with the Court.

During the time pertinent to the issues raised by this petition, Phelps Dodge Western Operations labor relations were headed by its Vice President and General Manager and its Director of Labor Relations. Neither had any role in labor relations at any other facility of Phelps Dodge nor at any of the subsidiaries, with the exception of a few small subsidiaries located in Arizona which are not involved in this case. (TXD 5, J.A. 10-11). There has never been a policy of transferring employees between any of the facilities of Phelps Dodge Western Operations or between any such facility and any subsidiary corporation of Phelps Dodge, or vice-versa. (TXD 6, J.A. 10, 12, 14, 16, 155, 156).

Prior to 1967, bargaining within Western Operations was conducted occasionally on the basis of negotiations with individual unions or locals. More often it was conducted, by consent, with various consolidations of some of the unions. At no time has Phelps Dodge ever combined bargaining for its Western Operations with bargaining for any other operations of Phelps Dodge or any of its subsidiaries. (TXD 6, J.A. 21).

In 1967 production and maintenance employees at Phelps Dodge Western Operations were represented by a number of different local unions and internationals. All contracts at those operations expired on July 1, 1967. Several months prior to the expiration date the company was advised that a Joint Committee (the AFL-CIO Joint Negotiating Committee for Phelps Dodge) would represent all labor organizations dealing with Phelps Dodge in Arizona. (TXD 7, J.A. 26, 75).

In April, 1967, one month before negotiations first began with Phelps Dodge in Arizona, the company received

from a union representative a booklet announcing the Unions' bargaining goals for the nonferrous metals industry. The stated goals included company-wide master agreements within all companies and subsidiaries in the industry and common termination dates for each company. (TXD 7, J.A. 327-340).

At the first general bargaining meeting for Western Operations, which was held in Douglas, Arizona, on May 10, 1967, Phelps Dodge was given letters authorizing the Joint Committee to bargain for all Arizona unions.[2] Phelps Dodge agreed to negotiate with the Joint Committee, reserving the right to withdraw from the arrangement with respect to any bargaining unit or units and to insist that meetings be confined to bargaining upon matters applicable to the particular unit. (TXD 9, J.A. 345-346).

At various bargaining sessions in May, June and July of 1967, the Joint Committee requested corporation-wide negotiations. It also requested inclusion of certain contractual clauses in all contracts of Phelps Dodge and its subsidiaries, including a "most-favored nations" clause and a modified no-strike clause which would have allowed strikes in support of lawful Steelworker strikes at other locations of the Company or any of its subsidiaries. (TXD 9, J.A. 400).

On July 15, 1967, a strike commenced at all Phelps Dodge Western Operations in Arizona. The Mackenzie-Walton Plant was struck on July 14 and the El Paso Refinery of PDRC on July 15. (TXD 10, J.A. 52, 138)

Further Western Operations meetings were held in August and September. At a joint meeting on August 19,

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[2] Except four IBEW locals, which joined it on March 5, 1968.

at which the principal Joint Committee spokesmen were present, a representative of the Federal Mediation and Conciliation Service (FMCS) stated without contradiction that the Union representative had advised him that among the matters of greatest importance to the unions was the demand that all plants and subsidiaries of Phelps Dodge be included in any settlement. (TXD 10, J.A. 53).

On October 12, the Joint Committee withdrew earlier demands for modifications of the no-strike clause and a most-favored nation clause. At this time, it submitted a counter proposal which included the following demands:

> "*Fordyce Plant*
>
> Agreements to be satisfactorily and simultaneously concluded
>
> *Phelps-Dodge Corporation and Phelps Dodge Refining Corporation Issues*
>
> To be satisfactorily resolved with all Unions and simultaneously concluded" (J.A. 353).

Union spokesman Orville Larson of the Steelworkers stated to the company committee that the item relating to Fordyce was a continuation of the proposal for corporation-wide bargaining and that Fordyce operation was taking the place in the bargaining of the MacKenzie-Walton Plant in Rhode Island, which by then was no longer owned by PDI. A similar demand was placed on the table by the union spokesman at the El Paso negotiations for PDRC on October 13. (J.A. 161).

Meetings were held in January, 1968, in Los Angeles between representatives of Phelps Dodge Western Operations and Larson and Joseph P. Molony, a Steelworker Vice-President, representing the unions. These meetings

resulted in agreement on all but three of the economic matters applicable to Western Operations.[3] At these meetings, the union committee continued to insist that the Western Operations settlement be contingent upon settlement of the contracts at Fordyce and El Paso. Molony stated that they could not withdraw the company-wide bargaining issue until they knew how their similar demand fared with others of the so-called big four copper producers, i.e., Kennecott, Anaconda, and American Smelting and Refining Company. (TXD 11, J.A. 64, 65).

Meetings between the Joint Committee and Phelps Dodge Western Operations were held in New York City later in January. The only topic discussed at these meetings was the removal of the Fordyce and El Paso issues from the bargaining within Phelps Dodge Western Operations, Phelps Dodge insisting that further bargaining could not be carried out until the Joint Committee withdrew the two demands for company-wide bargaining. This the representatives of the Joint Committee refused to do, insisting that simultaneous and satisfactory settlements had to be reached at all the plants. (TXD 12).

The Habirshaw Division of PD~~CPC~~ in Yonkers, New York, which is made up of four plants, constituted a single bargaining unit represented by Local 3 of the IBEW. Initial negotiating meetings were held on January 16 and January 18. On February 1, 1968, the date the contract expired, Habirshaw was struck. (TXD 12-13, J.A. 142-145).

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[3] 1. Recognition of strike time for 1968 vacation purposes.

2. A proposal for an early pension at age 55.

3. The amount of weekly indemnity for sickness.

At the end of January, the Secretaries of Labor and Commerce appointed a special panel which came to be known as the Taylor Panel. It invited the parties to send representatives to hearings conducted by it during the week of January 30 in Washington, D. C. (TXD 12). At the Taylor Panel hearings, Molony stated that the unions wanted common termination dates for all properties, and extension of the eventual economic settlement to all plants of each company (TXD 12, J.A. 369). Molony admitted that the company's allegation that the unions were seeking company-wide bargaining was "true".[4] (J.A. 386). When asked to explain what he meant by the term, Molony referred to Phelps Dodge Operations in Arizona, the operation at PDRC in El Paso and the plant of PDCPC in Fordyce, Arkansas. (TXD 13, GC Ex. 186, p. 87-91). His testimony came two days before the strike commenced at Yonkers, but he accurately predicted that the strike would occur. (J.A. 389).

After the conclusion of the Taylor Panel hearings, there were no further meetings between the parties until March 4, 1968, when they returned to Washington to resume bargaining at the invitation of President Johnson. By March 8, all the outstanding issues for Phelps Dodge Western Operations had been resolved and an oral agreement was reached. (TXD 13, J.A. 77, 78).

Although an agreement with the Joint Committee was reached on March 8, 1968, representatives of the Company were advised on the following morning that the settlement

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[4] Molony also stated that the strike could end when the companies, i.e., the so-called big four, "decide that they will abandon their practice of bargaining plant by plant, mine by mine, union by union." (J.A. 388).

would have to be submitted for approval to a body known as the Non-Ferrous Industry Conference (NIC), a Steelworkers body. Approval by such a conference was unprecedented in the prior collective bargaining history of Phelps Dodge. (TXD 14, J.A. 122-126, 78). On March 11, the NIC adopted a resolution to the effect that the agreement reached at the Western Operations of Phelps Dodge would neither be accepted nor rejected and directed its negotiators to return to the bargaining table to seek assurance that there would be uniform expiration dates at all properties of Phelps Dodge. (TXD 14, J.A. 128, 433-434). The NIC reconvened on March 13 and 14, and the company received word that the NIC had neither rejected nor accepted the settlement despite the fact that by the evening of March 13, Phelps Dodge and the Committee were in full agreement on the specific language of the document memorializing the March 8 oral agreement. (J.A. 81, 84).

On March 15, the Phelps Dodge Committee for Western Operations and representatives of the union, including Larson and Molony, called on Secretary of Labor Wirtz to thank him for his assistance during the Washington meetings. During the course of the meeting, Molony told the Secretary that the settlement at Phelps Dodge Western Operations was a good one which he could recommend but that he did not believe the NIC was going to approve it "because the document is incomplete and does not do anything for the people at Fordyce or in Yonkers". (TXD 14-15, J.A. 86-87). Later on the same day in separate negotiations, PDCPC reached agreement with respect to Fordyce and Habirshaw, and on the morning of the following day, March 16, the NIC approved the settlement as to the Phelps Dodge Western Operations. (TXD 15, J.A. 91). Ratification by the local unions was completed shortly thereafter and the strike ended on March 19. (J.A. 89).

The Memorandum of Settlement executed by the parties on March 22 with respect to Western Operations included no reference to the El Paso Refinery of PDRC or the plants at either Fordyce or Yonkers or the bargaining units at either of those locations. The Memorandum resulted in the continuation of sixteen separate labor agreements within Phelps Dodge Western Operations.

B. THE BOARD'S DECISION AND ORDER

The Trial Examiner and the Board found that one of the unions' objectives in the course of bargaining was to obtain an agreement on terms and conditions of employment to be applicable generally on a company-wide basis, including bargaining units in Petitioner's subsidiary facilities, and that the strikes conducted by the unions were intended in substantial part to force Petitioner to accede to such demands. The Board found that certain specific demands of the unions were evidence of the unions' objective. Among these were the demands for the following: (1) Most-favored nations clause; (2) Modified no-strike clause; (3) Common expiration dates; and (4) Simultaneous settlement of contracts. The Board did not find that these demands were either mandatory or non-mandatory subjects of bargaining nor did it find that their cumulative effect violated the Act. It merely found that they were evidence of the unions' intention. The basis of the Board's decision is found in the following statement:

> "We find, as did the Trial Examiner, that by insisting in furtherance of the aforesaid objective as a condition of settlement of negotiations covering the charging party's operations at its Western Division, on *simultaneous*

> *and satisfactory settlement of contracts in other bargaining units* and by striking in support of such demands, respondents have unlawfully attempted to engage in company-wide bargaining." Decision and Order of the Board, pp. 5-6. (Emphasis added).

As, in Petitioner's view, the court of appeals misinterpreted the Board's decision, it is important to analyze it closely. Petitioner submits that the following statement fairly summarizes the Board's decision.

> "We agree with the Trial Examiner that one of the Unions' primary objectives was to obtain agreement on terms and conditions of employment on a company-wide basis. The unions' request for a "most favored nation" clause, a limited no-strike clause, and simultaneous settlement are evidence of this objective.
> We also find that the demand for simultaneous and satisfactory settlement is clear evidence of this objective and that this demand, in and of itself, was an unlawful attempt to engage in company-wide bargaining."

The Board found a further independent violation of the Act arising out of the failure of the NIC to promptly approve the Western Operations' agreement reached on March 8, 1968.

C. THE DECISION OF THE COURT OF APPEALS

In the proceedings before the court of appeals, Petitioner intervened and briefed and argued the matter along with the Board and the unions. The opinion of the court of

appeals, which was filed March 31, 1971, and thereafter modified on May 25, 1971, recognized that the Board had held that the demands for simultaneous and satisfactory settlements at properties other than Phelps Dodge Western Operations was an unfair labor practice. It made no furthur mention of this subject. The Trial Examiner and the Board had cited certain individual union proposals such as the "most-favored nations" clause, the "limited no-strike" clause and the demand for simultaneous settlement, as evidence that the unions were seeking a company-wide agreement. The court concluded that the Board had determined that these proposals, in the aggregate, constituted an unfair labor practice. The court determined that is must assume *arguendo* that each of the individual demands were in and of themselves mandatory subjects of bargaining, and they could therefore not in the aggregate constitute an unfair labor practice. Although Petitioner specifically argued that it was the demands for simultaneous settlement and satisfactory settlement for bargaining units at other properties that constituted the unfair labor practice, the court passed over this contention without discussion. It apparently concluded that a demand for simultaneous settlement was a mandatory subject of bargaining although it cited no authority and gave no reasons for this conclusion. It did not determine whether the demands for simultaneous settlement, and satisfactory settlement, which the Board had specifically found to be an unfair labor practice, were or were not violations of the Act. The net effect of the court's approach to the issue was to put its imprimatur on the unions' demands for simultaneous settlement and satisfactory settlement without even discussing the issue.

In further support of its conclusion, the court of appeals observed that the fact that a demand may have

extra unit effects does not necessarily alter its status as a mandatory subject of collective bargaining, citing cases decided by this Court including the recent case of *N.L.R.B. v. Pittsburgh Plate Glass Co.*, 30 L.Ed.2d 341 (1971).

REASONS FOR GRANTING THE WRIT

1. *The case presents an extremely important question of federal labor law which has not been and should be decided by this Court.*

This is the first time this Court has had the opportunity to consider the legality of the technique of what has come to be called "coalition bargaining".[5] One leading commentator has described the goal of the unions in coalition bargaining as follows:

> "[T]he goal of the coalition is to bring about unilaterally an enlargement of the scope of negotiations and of decision-making to embrace a fragmented group of bargaining units that hitherto had negotiated separately; and to accomplish

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[5] Earlier cases concerning related subjects include *Douds v. ILA*, 147 F. Supp. 103 (S.D.N.Y. 1956), aff'd, 241 F.2d 278 (2d Cir. 1967) where the Second Circuit held that a union violated the Act by demanding that the employer association agree to enlarge the bargaining unit; *Standard Oil Co.*, 137 NLRB 690, enf'd 322 F.2d 40 (6th Cir. 1963) where a union refused to implement a settlement until a simultaneous settlement was reached at another plant. See also, *Kennecott Copper Corp.* 70 Lab. Rel. Rep. 427 (April 4, 1969) involving the 1967-68 strike in the non-ferrous metals industry and *Shell Oil Co.* 194 NLRB 166 (1972).

this while leaving these separate units technically intact."[6]

The ostensible rationale of the unions is a need to redress an alleged imbalance of bargaining power. The movement for coalition bargaining mounted by the Industrial Union Department of the AFL-CIO in the 1960's has been characterized as "probably the most dramatic attempt to alter the balance of bargaining power in recent years . . ."[7] . . . ."

Although multi-union and multi-employer bargaining has been practiced voluntarily in some industries for years, particularly the building trades, this Court has never had the opportunity to consider the question of whether a union or group of unions holding bargaining rights for employees in bargaining units A, B and C can, over the objections of the employer, insist as a condition of settlement of negotiations for those bargaining units that the employer agree to simultaneous settlement and to satisfactory settlement of negotiations involving bargaining unit D. The coalition bargaining movement and the resistence to it on the part of employers has provoked what one news magazine termed "a holy war – perhaps the most significant of the decade –".[8] It is no wonder that the unions in their brief to the Board (p. 1) characterized it as "one of the

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[6] G. HILDEBRAND, BARGAINING STRUCTURE AND RELATIVE POWER, Report No. 5, Collective Bargaining: Survival in the 70's (Industrial Research Unit, Department of Industry, Wharton School of Finance & Commerce, University of Pennsylvania, 1972), at 10.

[7] *Id.*

[8] Newsweek, March 11, 1968 at page 73.

most important cases – if not *the* most important case – to come before the Board in many years."[9]

The union rationale for allowing union bargainers to demand simultaneous and satisfactory settlement of contract terms for bargaining unit D as a condition of settling negotiations for bargaining units A, B and C is that the bargaining units involved have been comprised of employees of the same company or, as in the instant case, of subsidiary corporations. In this case, although the employees in the different bargaining units involved are employed in various facets of the non-ferrous metals industry, in the "mine to consumer" pipeline there are considerable differences between the duties and skills involved in mining, milling and smelting non-ferrous metals and in manufacturing wire and cables.[10] The increasing presence of the multiple industry corporations in our national economy underscores the importance of the issue. If coordinated bargaining in the fashion here attempted is allowed on the theory that the same "company" is involved, a union bargaining for telephone installers of subsidiary corporation

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[9] For comments on the issue, see L. WAGNER, MULTI-UNION BARGAINING: A LEGAL ANALYSIS, 19 Lab L. J. 731; D. BENETAR, COALITION BARGAINING UNDER THE NLRA, NEW YORK UNIVERSITY TWENTIETH ANNUAL CONFERENCE OF LABOR (New York: Matthew Bender, 1968), at 219; and ABRAMSON, COORDINATED BARGAINING BY UNIONS, *Id.* at 231.

[10] In *U.S. Pipe and Foundry*, 129 NLRB 359, enf'd 298 F.2d 873 (5th Cir. 1962), the court held that a union did not violate the Act by demanding common termination dates of contracts at separate plants of an employer which all produced the same product. The court found that employees had a direct, economic interest in such a demand because the company could have settled at one plant and shifted its production there, relieving the economic pressure to settle at the other plants. Whether that decision was

(continued)

A of a conglomerate could demand simultaneous and satisfactory settlement of negotiations involving employees of subsidiary corporation B, a food processing company, represented by the same or a different union, on the theory that both have the same parent corporation. Whether this should be permitted is obviously a public policy matter of tremendous importance.

The decision of the court of appeals will affect bargaining all over the United States. Yet the court failed to decide the precise question at issue; i.e., whether demands for simultaneous settlement and satisfactory settlement of contracts in other bargaining units was an unfair labor practice. The opinion of the court of appeals sanctioned what the bargainers for the Joint Committee were saying in effect to the Phelps Dodge Western Operations bargainers from October 12, 1967, to March, 1968:

> "We will agree with you across the table on every matter relating to wages, hours and other conditions of employment of employees at Western Operations; we will agree with you across the table on every matter to be included in the contracts covering the Western Operations; but having reached agreement with you on all such matters, we will not consummate the agreement, we will not sign it, and we will not end our strike at Western Operations, until certain events take place in Texas, Arkansas, and New York."

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[10] (continued) correct is beside the point, as the "bailing with a a sieve" theory of the court in *U.S. Pipe* could be applied to the instant case only by the most careless observer. Phelps Dodge cannot mine copper in Yonkers, New York. Nor is it equipped to manufacture wire or cable in Douglas, Bisbee, Morenci or Ajo, Arizona.

With all deference, Petitioner submits that the court of appeals completely missed the point.

Petitioner recognizes that this Court does not sit as a Supreme Court of errors to review any and all cases where a court of appeals might have made a mistake. However, the serious consequences of allowing a patently erroneous decision to stand in this important and volatile area of labor laws are obvious. The Court should hear the matter on the merits to resolve this issue.

2. *To the extent the court of appeals relied on previous decisions of this Court, it misconstrued them and its decision is in conflict with the applicable decisions of this Court.*

Because of the cases cited by the court of appeals in its opinion, the court appeared to rest its decision, in part, on the theory that because the terms and conditions of employment in plants at El Paso, Fordyce and Yonkers were of some interest to Arizona employees, the fact that a bargaining demand for simultaneous and satisfactory settlement had extra-unit effect did not make it non-mandatory. It cited, *Teamsters v. Oliver*, 358 U.S. 283 (1959),[11]

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11 This case involved the application of the Ohio state anti-trust laws to a provision of a collective bargaining contract prescribing terms and conditions regulating the minimum rental when a motor vehicle was leased to a carrier by an owner who drove the vehicle in the carrier's service. In holding that the provision was a mandatory subject of collective bargaining, thus precluding the application of the state law, this Court observed that the amount of the rental was of "vital concern to the carrier employed drivers", i.e., those in the bargaining unit, 358 U.S. at 293.

American Federation of Musicians v. Carroll, 391 U.S. 99 (1968),[12] *Fiberboard Paper Products Corp. v. N.L.R.B.*, 399 U.S. 204 (1964),[13] and the recent case of *N.L.R.B. v. Pittsburgh Plate Glass Co.*, 30 L Ed 2d 341 (1971). In its opinion the court correctly noted that the fact that a demand may have extra-unit effect does not alter its status as a mandatory subject of bargaining. But considering whether a demand has extra-unit effects without first considering whether it relates to wages, hours, or other terms and conditions of employment for employees of the bargaining units for which the demand is made is a classic case of putting the cart before the horse. In all of the cases cited by the court of appeals, with the exception of *Pittsburgh Plate Glass, supra*, this Court held that the challenged bargaining demand or contract provision concerned was a mandatory subject of collective bargaining under the Federal labor laws. If a demand or provision is a mandatory subject of bargaining the fact that it has extra-unit effect does not alter its status, but the first and critical question is whether the demand itself is mandatory.

Although the opinion of the court of appeals is not clear on this point, it appears to say that if the subject of the demand is of some interest to members of the bargaining unit it is a mandatory subject of bargaining. This is at

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[12] This Court held that certain regulations of the Musicians Union were within the labor disputes exemption of the anti-trust laws as justifiable means for preserving job opportunities and the wage scale of the union members.

[13] In this subcontracting case this Court aptly observed that the bargaining demand related to the very existence of bargaining unit jobs, considerably different from the interest those in the Arizona bargaining its might have in wages in bargaining units thousands of miles away.

complete variance with *N.L.R.B. v. Pittsburgh Plate Glass Co., supra,* where this Court, in discussing the status of retirees, said:

> "The inclusion of retirees in the same insurance contract surely has even less of an impact on the 'terms and conditions of employment' of active employees than some of the contracting activities which we excepted from our holding in *Fibreboard.*"
> 30 L. Ed. 2d at 358.

To paraphrase the foregoing statement, a demand that Arizona bargainers agree to simultaneous settlements and satisfactory settlements of negotiations at plants in El Paso, Texas, Fordyce, Arkansas, and Yonkers, New York, surely has even less of an impact on the terms and conditions of employment of Arizona employees than any number of subjects which are manifestly not mandatory subjects of bargaining. Management decisions concerning financing, sales, use of equipment and plant design, all of which clearly are not mandatory subjects of bargaining, probably are of more interest to Arizona mining and smelting employees and affect them more directly than the wages and other terms and conditions of employment of employees of wire and cable fabricating plants in the Eastern United States.

Although cited by both the Board and Petitioner, the court of appeals ignored the important guidance provided by this Court in *United Mineworkers of America v. Pennington,* 381 U.S. 657 (1965), when it aptly noted:

> "We have said that a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union

> interest seek to obtain the same terms from other employers . . . . But there is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages and hours and working conditions of other bargaining units or attempt to settle these matters for the entire industry. On the contrary, the duty to bargain unit by unit leads to a quite different conclusion." 381 U.S. at 666.

We submit that to the extent previous decisions of this Court are applicable to the question at hand the decision of the court of appeals is at variance with all of them.

CONCLUSION

Petitioner submits, and the Unions apparently agree, that this case is one of the most important labor cases to be decided by the Board in the last decade. The practical impact of the decision on collective bargaining throughout the United States could be enormous. All multi-plant corporations whose employees are unionized, whether by one or a number of unions, could be affected. We submit that a Writ of Certiorari should issue to review the decision of the court of appeals.

Respectfully submitted,

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Of Counsel

EXPLANATORY NOTE

Portions of the Opinion of the Court of Appeals for the Third Circuit, *infra*, have been shaded. These shaded portions contain the language in the Opinion as it appeared prior to modification by the Court on May 25, 1972.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AFL-CIO JOINT NEGOTIATING COMMITTEE FOR PHELPS DODGE AND ITS AGENTS, ORVILLE LARSON, L. V. CERVANTES, C. K. FEATHERSTON AND M. R. BARRAZA

UNITED STEELWORKERS OF AMERICA AND ITS AGENTS, JOSEPH P. MOLONY, VICE PRESIDENT, ORVILLE LARSON, STAFF REPRESENTATIVE, AND M. R. BARRAZA, BOARD MEMBER

UNITED STEELWORKERS OF AMERICA, LOCAL NO. 551, AND ITS AGENT, SAM LUCERO, PRESIDENT

UNITED STEELWORKERS OF AMERICA, LOCAL NO. 6305, AND ITS AGENT, ROBERT A. SWIFT, PRESIDENT

UNITED STEELWORKERS OF AMERICA, LOCAL NO. 616, AND ITS AGENT, E. G. MARQUEZ, PRESIDENT

UNITED STEELWORKERS OF AMERICA, LOCAL NO. 4776, AND ITS AGENT, FRANK VALENCIA, PRESIDENT

INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE NO. 1121, AND ITS AGENTS, R. HUTTO, GRAND LODGE REPRESENTATIVE AND RAY PRICE, PRESIDENT

INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE NO. 596, AND ITS AGENT, L. P. SCHOLTON, PRESIDENT

INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE NO. 1132, AND ITS AGENT, L. V. CERVANTES, PRESIDENT

INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE NO. 1357, AND ITS AGENT, G. B. CURRY, PRESIDENT

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 428, AND ITS AGENTS, WILLIAM POWELL, BUSINESS REPRESENTATIVE AND C. K. FEATHERSTON, DISTRICT REPRESENTATIVE

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 429, AND ITS AGENT, A. T. EUBANKS, PRESIDENT

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS, AND HELPERS OF AMERICA, LOCAL NO. 639, AND ITS AGENTS, FRED H. HALLSTED, PRESIDENT, AND COTTON MURRAY, INTERNATIONAL REPRESENTATIVE

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS, AND HELPERS OF AMERICA, LOCAL 506, AND ITS AGENT, P. R. GONZALES, PRESIDENT

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS, AND HELPERS OF AMERICA, LOCAL 479, AND ITS AGENT, J. C. JACKS, PRESIDENT

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 310, AND ITS AGENTS, TOM OWEN, PRESIDENT, CARLTON WALLMARK, SECRETARY-TREASURER, AND T. R. TWOMBLY, VICE PRESIDENT

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AND ITS AGENTS, E. F. BREHANY, ACTING VICE-PRESIDENT, G. E. COLE, MORENCI, LOCAL CHAIRMAN AND W. B. RUNYAN, NEW CORNELIA LOCAL CHAIRMAN

BROTHERHOOD OF RAILROAD TRAINMEN AND ITS AGENTS, ROBERT CANTRILL, DEPUTY PRESIDENT, R. B. WEST, MORENCI, LOCAL CHAIRMAN, AND ELVIN L. JACOBS, NEW CORNELIA LOCAL CHAIRMAN

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL NO. 221, AND ITS AGENT, E. F. BAUGHMAN, PRESIDENT

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL NO. 238, AND ITS AGENTS, ROBERT HIGHTOWER, PRESIDENT, AND BEN COLLINS, GENERAL REPRESENTATIVE

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 679, AND ITS AGENT, R. E. CARRELL, PRESIDENT

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 797, AND ITS AGENT, B. J. CHANEY, PRESIDENT

BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, LOCAL 1664, AND ITS AGENT, M. R. SANCHEZ, PRESIDENT

BRICKLAYERS, MASONS AND PLASTERERS, INTERNATIONAL UNION OF AMERICA, LOCAL NO. 3 OF ARIZONA

INTERNATIONAL CHEMICAL WORKERS UNION, LOCAL NO. 703, AND ITS AGENT, JOHN GERNAK, INTERNATIONAL REPRESENTATIVE, AND E. R. TRUJILLO, PRESIDENT

BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, AT LARGE, AND ITS AGENT, M. W. SIGMAN, LOCAL PRESIDENT

MORENCI METAL TRADES COUNCIL AND ITS AGENT, L. V. CERVANTES, PRESIDENT

AJO METAL TRADES COUNCIL AND ITS AGENT, ROBERT WELLS, PRESIDENT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AND ITS AGENT, GEORGE B. BARCLAY, INTERNATIONAL REPRESENTATIVE

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 434, AND ITS AGENT, M. E. OVERFIELD, PRESIDENT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 487, AND ITS AGENT, JOHN H. WARNE, PRESIDENT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 523, AND ITS AGENT, JODIE FINCHER, PRESIDENT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 1254, AND ITS AGENT, JOHN W. McLAUGHLIN, PRESIDENT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 3, AND ITS AGENT, EDWARD CLEARY, PRESIDENT

and Case 28-CB-449

PHELPS DODGE CORPORATION

JUDGMENT

Before: STALEY, ADAMS and ROSENN, *Circuit Judges.*

THIS CAUSE came on to be heard upon the petition to review, and a cross-application for enforcement of, an order of the National Labor Relations Board dated August 19, 1970, against the above named Petitioners, their officers, agents, and representatives. The Court heard argument of respective counsel on September 14, 1971, and

has considered the briefs and transcript of record filed in this cause. On March 31, 1972, the Court being fully advised in the premises, handed down its opinion denying enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Third Circuit that enforcement of the order of the National Labor Relations Board directed against the above named Petitioners, their officers, agents, and representatives, be and it hereby is denied.

IT IS FURTHER ORDERED that costs shall be taxed against the Respondent.

BY THE COURT

STALEY
Circuit Judge

DATED: May 9, 1972

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,199

AFL-CIO JOINT NEGOTIATING COMMITTEE
FOR PHELPS DODGE, *et al.*,
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

and

PHELPS DODGE CORPORATION,
Intervenor.

On Petition to Review a Decision and Order of the National Labor Relations Board

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ARGUED SEPTEMBER 14, 1971
Before STALEY, ADAMS and ROSENN, *Circuit Judges*

OPINION OF THE COURT
(Filed March 31, 1972)

By STALEY, *Circuit Judge*

This case comes to us upon the petition of the AFL-CIO Joint Negotiating Committee for Phelps Dodge ("the committee" or "the unions") to review and set aside an order of the National Labor Relations Board and upon the Board's cross-application to enforce that order.[1] The

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[1] The decision and order of the Board are reported at 184 N.L.R.B. No. 106.

Board found that the various unions constituting the committee had engaged in unfair labor practices during negotiations for collective bargaining contracts with Phelps Dodge Corporation and various of its subsidiaries ("Phelps Dodge" or "the company.").

The negotiations involved took place during most of 1967 and part of 1968. Phelps Dodge is engaged, *inter alia*, in the mining, concentrating and smelting of ores, principally copper ore, in the western part of the United States. Its Western Operations division includes four locations in Arizona. Also involved in the negotiations were two wholly-owned subsidiary corporations, Phelps Dodge Refining Corporation, which operates a refinery at El Paso, Texas, and Phelps Dodge Copper Products Corporation, engaged in the manufacture of copper wire and cable at Fordyce, Arkansas, and in Yonders, New York.

The Board ruled that the unions, by conditioning settlement of negotiations covering the Phelps Dodge Western Operations upon simultaneous and satisfactory settlement of contracts in other bargaining units in other company locations and by striking in support of that demand, had unlawfully attempted to engage in company-wide bargaining beyond the scope of established bargaining units. The Board found that insistance upon simultaneous settlements was part of an over-all strategy by the Arizona unions to enlarge the bargaining unit by merging the bargaining of separate units. It ruled that the conduct of negotiations on a basis broader than the established bargaining unit is non-mandatory, and the unions' insistence that Phelps Dodge engage in such bargaining was violative of the National Labor Relations Act.

The scope of our review in the instant case is limited to the determination of whether or not the Board's findings

are supported by substantial evidence in the record and have a basis in law. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944); *Local Union No. 519 v. NLRB*, 416 F.2d 1120 (C.A.D.C., 1969).

In the 1967-1968 negotiations the many unions representing employees at the Western Operations bargained through the medium of the AFL-CIO Joint Negotiating Committee for Phelps Dodge.[2] Prior to 1967, bargaining at the Western Operations had varied, being conducted at times on the basis of negotiations with individual unions and at times on the basis of negotiations with combinations of various unions. In 1967, the parties agreed to the joinder of all of the bargaining units in Arizona locations into a single negotiating format,[3] the Joint Committee. At the outset, negotiations were also opening at locations operated by Phelps Dodge subsidiaries in El Paso and Rhode Island. A request was made by the unions that Phelps Dodge agree to joint bargaining on a company-wide basis wherever negotiations were open. The company rejected the request. The unions subsequently abandoned this demand, and separate negotiations ensued at the various company locations.

At this point, the Board and the unions begin to disagree on the facts as well as the law. The Board contends, and the trial examiner so found, that the over-all objective of a company-wide labor agreement was never abandoned and that the unions persisted in pursuing this objective in bargaining with Phelps Dodge. The Board's

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[2] The four bargaining units represented by the I.B.E.W. did not participate in the joint bargaining until late in the negotiations.

[3] There is a total of 40 bargaining units in the Arizona operations.

analysis of the evidence begins with an overview of the nationwide dispute and strike in the copper industry in 1967. The Board notes that the unions representing employee units in this industry joined their efforts and directed them against the four major copper producers, one of which is Phelps Dodge.[4] The bargaining goals which the unions intended to seek throughout the copper industry were formulated in March of 1967 at the unions' Nonferrous Industry Conference. Included among those goals were company-wide master agreements and common contract termination dates. It is the Board's position that the record of negotiations, viewed as a whole, demonstrates that these goals were never abandoned. The Board cites the unions' demand for a "most favored nations" clause,[5] their demand for a limited no strike provision, their demand for common contract expiration dates, and their demand for simultaneous settlements of all contracts as corroborative evidence of an effort to compel Phelps Dodge to engage in company-wide bargaining.

The unions' joint negotiating committee, petitioners in this court, deny that they were attempting to engage in company-wide bargaining. Petitioners candidly admit that one of their bargaining goals had been to establish company master agreements and common expiration dates. They

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[4] The other major copper producers are Kennecott Copper Corp., Anaconda Company, and American Smelting and Refining Co., with their various subsidiaries.

[5] This clause provided:

> "When, during the term of this agreement, the Company and the United Steelworkers of America negotiate an agreement covering any other operations of the Company, the Union shall have the right, upon demand, to have any provisions of said agreement incorporated into this agreement."

assert that this demand for master agreements was abandoned prior to the strike and contend that their demand for simultaneous settlements, which they admittedly did not abandon, was not an attempt to engage in illegal company-wide bargaining. Petitioners point out that negotiations were conducted separately in the various units of Phelps Dodge and that there was no insistence on discussion in one locale as to the contract of another locale.

We deem it necessary at this point to restate that this matter is before us on a petition to review and set aside an opinion and order of the NLRB. We reiterate in order to emphasize the fact that the Board opinion and order must stand or fall upon the findings of fact and conclusions of law contained therein. In the instant case, counsel for the Board has advanced an argument in support of the Board's order that is really a rationalization of the Board's decision.[6] We may not consider such an argument. "[A]n administrative order cannot be upheld unless the grounds upon which the agency acted * * * were those upon which its action can be sustained." SEC v. Chenery Corp., 318 U.S. 80, 95 (1943). We cannot accept counsel's *post hoc* rationalizations for agency action. NLRB v. Metropolitan Life Insurance Co., 380 U.S. 438 (1965).

[6] The Board's brief argues that the effect of the demands made by the unions would be that employees in other units would receive the same terms and conditions as the employees in the Western Operations. The argument contends that, as a practical matter, the result would be the same as if the unions had negotiated for other units in the Western Operations negotiations. Since such an instance would have been violative of the Act, the Board's counsel contends that a course of conduct that is designed to achieve the same result is likewise violative. This was clearly not the import of the Board's decision, which found that the unions did seek to negotiate about terms and conditions in other units.

The Board found that the strikes conducted by the unions throughout the facilities of Phelps Dodge were intended, in substantial part, to force the company to accede to a demand for an agreement on terms and conditions of employment to be applicable generally on a company-wide basis. After examining the decision by the trial examiner and the Board's opinion, we conclude that the Board's finding was based largely upon its belief that the unions began negotiations with the intention to secure company-wide master contracts and never abandoned that goal. The Board's opinion cites public statements made by union officials during the strike as well as a union publication to support its contention that company-wide bargaining was the principal factor underlying the copper strike. The Board then cites as corroborative evidence of an effort to force company-wide bargaining the unions' insistence to impasse on the demands set forth earlier. Convinced that the unions had never abandoned the objective of company-wide contracts, the Board found those demands to have been mere stratagems to achieve that end.[7]

We find that the Board's opinion and order are not substantiated by the record and are without a basis in law. Counsel for the Board concedes that the demands insisted upon to impasse in this case were all mandatory subjects

[7] The Board's decision asserted that the "most favored nations" clause coupled with the limited no-strike provision would have permitted the unions, even though they might have concluded a contract covering the Arizona operations, nevertheless to remain out on strike in concert with employees in other operations until a contract or contracts had been reached in such other operations, at which juncture the unions in Arizona could then require the company to apply the best terms of the latter contracts to the Arizona operations. The company rejected these demands, characterizing them as demands for company-wide bargaining, and the Board agreed with the company's appraisal.

of bargaining, but asserts that these demands were part of an over-all strategy to force the company to negotiate on a basis broader than the established bargaining unit. The Board concedes that it did not find the union's insistence on the four demands to be a per se violation of the Act; rather the Board asserts that those demands were part of an over-all strategy to force the company to negotiate on a basis broader than the established bargaining units. The Board, in the exercise of its discretion, may of course find bad faith bargaining even with regard to mandatory subjects if done with a closed mind. Such a finding must be supported by sufficient evidence of bad faith in the record of negotiations. Texas Foundries, Inc. v. NLRB, 211 F.2d 791 (C.A. 5, 1954). The Board's opinion in the instant case, however, does not find that the unions bargained in bad faith. As we read it, the Board's opinion finds that the unions employed mandatory demands to achieve a non-mandatory objective, that of enlarging the bargaining unit. As we read it, the Board's opinion finds that, even assuming the unions' demands were mandatory subjects of bargaining, the unions employed those demands to achieve a non-mandatory objective, that of enlarging the bargaining unit. The record in this case will not support such a finding.

Separate negotiations were conducted at each of the company's units. No bargaining was conducted at any unit with regard to wages, terms, or employment conditions at other locales. The unions in Arizona insisted to impasse upon their demand for a "most favored nations" clause and a limited no-strike provision. During the strike, these two demands were withdrawn and a demand was made for simultaneous settlement of all contracts. These demands were all mandatory subjects of bargaining, and as such the

unions may bargain to impasse on each or all of them. Assuming without deciding, as the Board did that those demands were all mandatory subjects of bargaining, as such the unions may bargain to impasse on each or all of them. NLRB v. American National Insurance Co., 343 U.S. 395 (1952). The fact that they did so is not evidence of an attempt to merge the bargaining of separate units. The Board in this case has equated parallel action by units with an unlawful motive. The fact that a demand may have extra-unit effects does not alter its status as a mandatory subject of bargaining. See American Federation of Musicians v. Carroll, 391 U.S. 99 (1968); Fiberboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964); Teamsters Union v. Oliver, 358 U.S. 283 (1959). Cf. Chemical Workers v. Pittsburgh Plate Glass Co., ___ U.S. ___ (1971).

We conclude from this record that in the Arizona negotiations petitioner unions did not insist that Phelps Dodge agree to terms and conditions of employment to be applicable generally to other bargaining units and that they did not strike to enforce such a demand.

The Board has advanced other union actions found to be violative of the Act. The trial examiner found that the unions had violated §8(b)(3) of the Act by conditioning settlement of the Arizona negotiations upon approval by the Nonferrous Industry Conference and by refusing to execute the Arizona agreement after it was reduced to written form pending settlement at other bargaining units. The Board found that there was ample evidence to support the trial examiner's findings.

It is clear from the record that no actual delay occured as the result of the submission of the agreement for the approval of the NIC. It is similarly clear from its decision and order that the Board was primarily concerned with an alleged attempt to unilaterally attack established bargaining units. Therefore, even assuming, *arguendo*, that the union's submission of the agreement for NIC approval was violative of the Act, it was harmless violation.

Accordingly, the decision and order of the Board will be set aside and its cross-application for enforcement will be denied.

To the Clerk:

File the foregoing opinion.

/s/ Staley
Circuit Judge

[Dated August 19, 1970]

* * * * *

DECISION AND ORDER

On July 10, 1969, Trial Examiner Martin S. Bennett issued his Decision in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that they cease and desist therefrom, and take certain

affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondents AFL-CIO Joint Negotiating Committee for Phelps Dodge, *et al.*, and the Charging Party filed exceptions and supporting briefs. The Charging Party and the General Counsel also filed briefs in answer to the Respondent's exceptions. The Respondent Bricklayers, Masons and Plasterers, International Union of America, Local No. 3 of Arizona, filed separate exceptions and a supporting brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the modification set forth below.

The Trial Examiner found, and we agree, that one of the Respondents' primary objectives throughout the course of bargaining at the Charging Party's Arizona operations was to obtain agreement on terms and conditions of employment to be applicable generally on a companywide basis, and that the strikes conducted by the Respondents throughout the Charging Party's facilities were intended, in substantial part, to force the Charging Party to accede to the Respondents' demands for such a companywide agreement. The record as a whole amply supports this conclusion.[1] Thus the Respondents' objective of companywide

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[1] We note that, as reflected by the record in this proceeding, this case arose in the context of a nationwide dispute and strike in the copper industry, in which the unions representing employee units in this industry joined their efforts and directed them

(continued)

bargaining was foreshadowed by the early announcement of the bargaining goals which the Respondents intended to seek throughout the copper industry.[2] The record of negotiations, viewed as a whole, demonstrates that the Respondents persisted in pursuing such an objective in bargaining with the Charging Party.[3] Statements in the

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[1] (continued) principally against the four major copper producers, Kennecott Copper Corporation, Phelps Dodge Corporation, Anaconda Company, and American Smelting and Refining Company, and their respective subsidiaries. Two of these producers, Kennecott and Phelps Dodge, filed charges alleging union violations of Section 8(b)(3) based upon the conduct of negotiations and the strikes at their respective operations. Complaints were subsequently issued, similar in nature, and proceeded to hearing in both cases. As did the Trial Examiner in the present case, the Trial Examiner in the Kennecott proceeding found that the unions there had violated Section 8(b)(3) in the conduct of negotiations and the strike. No exceptions to the Trial Examiner's Decision were filed in that case, and the Board adopted the Trial Examiner's Decision and his order *pro forma*.

[2] These goals were formulated by the unions' "Nonferrous Industry Conference" in March 1967, and were thereafter embodied in the printed booklet entitled "1967 Nonferrous Bargaining Policy Goals."

[3] We include in such conduct Respondents' request for a "most favored nation" type of clause which, coupled with Respondents' proposal for a limited no-strike provision, would have permitted the Unions, even though they had concluded a contract covering the Arizona operations, nevertheless to remain out on strike in concert with the employees in other operations until a contract or contracts had been reached in such other operations, at which juncture Respondents could then require the Charging Party to apply the best terms of the latter contract or contracts to the Arizona operations. The Charging Party steadfastly rejected these proposals, which remained on the bargaining table from early in the Arizona negotiations (continued)

Respondents' authorized publications[4] confirm this. And testimony of members of the Respondents' Nonferrous Coordinating Committee[5] before the Special Panel appointed by the Secretaries of Labor and Commerce to assist in settlement of the copper dispute disclose a specific avowal that the Respondents' desire to achieve companywide bargaining was a principal factor underlying the copper strike.

We find, as did the Trial Examiner, that by insisting in furtherance of the aforesaid objective, as a condition of settlement of negotiations covering the Charging Party's operations in its Western Division, on simultaneous and

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[3] (continued) until well after the strike, characterizing them as demands for companywide bargaining. Under all the circumstances of this case, and particularly in the light of Respondents' repeatedly expressed intention to seek employment terms which should be applicable on a companywide basis, we agree with the Charging Party's appraisal of these provisions and find that Respondents' insistence to impasse upon these proposals for the period described provides corroborative evidence of Respondents' effort to compel the Charging Party to engage in companywide bargaining. For the same reasons, and in the light of Respondents' continued expression of the aforesaid intention, we find that Respondents' subsequent demands for simultaneous settlements of all contracts, which followed Respondents' withdrawal of the two proposals above mentioned, also confirm Respondents' purpose to require bargaining on a companywide basis.

[4] Such as the "Brief Union Summary of the 1967 Copper Strike" issued by the Steelworkers in September 1967.

[5] The Committee consisted of seven members of whom four testified before the Special Panel. These were Joseph P. Molony, Vice President of United Steelworkers; A. C. Skinner, International Representative of the Steelworkers; Otis Brubaker, Research Director of the Steelworkers and Russ Williams, International Representative of the IBEW.

satisfactory settlement of contracts in other bargaining units and by striking in support of such demands, Respondents have unlawfully attempted to engage in company-wide bargaining. We do not and need not evaluate the Respondents' bargaining efforts in terms of the merits of the goal sought to be achieved. For it is well established that the integrity of a bargaining unit, whether established by certification or by voluntary agreement of the parties, cannot as here be unilaterally attacked.[6] The conduct of negotiations on a basis broader than the established bargaining unit is nonmandatory, and the Respondents' insistence that the Charging Party engage in such bargaining was violative of the Act.[7]

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[6] *Douds v. International Longshoremen's Association*, 241 F.2d 278, 282-283 (C.A. 2); *International Longshoremen's Association (New York Shipping Association, Inc.)*, 118 NLRB 1481, 1483 (enforcement denied on other grounds), 277 F.2d 681 (C.A.D.C.); *N.L.R.B. v. Montgomery Ward & Co., Inc.*, 399 F.2d 409, 412 (C.A. 7); *Central Soya Company, Inc.*, 142 NLRB 930, 939; *Texlite, Inc.*, 119 NLRB 1792, 1797-1798.

[7] *N.L.R.B. v. Wooster Division of Borg-Warner Corporation*, 356 U.S. 342.

The Respondents here contend that the strikes involved in this proceeding were merely simultaneous strikes in which each bargaining unit struck in support of the demands of other bargaining units as well as its own, and that the Respondents' demands for common contract expiration dates were only to enable the separate bargaining units to continue to mutually support each other's demands. In support of this position the Respondents rely upon the decision in *United States Pipe and Foundry Co. v. N.L.R.B.*, 298 F.2d 873 (C.A. 5), cert. denied, 370 U.S. 919, wherein the Court held that a demand for common contract expiration dates was a mandatory subject of bargaining. In that case the employees in the separate bargaining units were engaged in the manufacture of

(continued)

Accordingly, we find that the Respondents, by demanding that the Charging Party engage in companywide bargaining, beyond the scope of established bargaining units, and by striking in support of its demands, has violated Section 8(b)(3) of the Act.[8]

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[7] (continued) substantially similar products, and the Court reasoned that without common expiration dates a union striking for a new contract on an expiration date different from those of other bargaining units might have to "bail with a sieve" while the employer shifted its production to the other units. The Respondents seek to have the Board apply this rationale to the present case where, although various units are engaged in production of different products, the employer could continue to withstand a strike in a separate unit more readily because of the profit realized from his unstruck operations. We deem it unnecessary, however, to pass upon the application of *United States Pipe and Foundry* here, because, as we have found above, the Respondents' demands went beyond a mere insistence on common expiration dates and amounted instead to an attempt to enlarge the bargaining unit by merging the bargaining in separate units; and the insistence on common expiration dates was but an element of strategy in its bargaining effort to achieve that end.

[8] The Trial Examiner found that the Respondents further violated Section 8(b)(3) of the Act by (1) conditioning settlement of the Arizona negotiations upon approval by the Nonferrous Industry Conference and (2) refusing to execute the Arizona agreement after it was reduced to written form pending settlement at other bargaining units. The Respondents contend that the complaint did not allege such violations and that they were not litigated at the hearing. The Respondents further contend that the findings are not supported by the evidence. After careful consideration of the complaint and the record we find that the complaint is sufficiently broad to encompass these two violations and that the Respondents were fully apprised that such violations were being litigated. We further find that there is ample evidence to support the Trial Examiner's findings of violations. (continued)

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondents, and each of them, their officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D.C., August 19, 1970.

John H. Fanning, Member

Frank W. McCulloch, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

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[8] (continued)

Chairman McCulloch, in concurring with the finding that the Respondents independently violated Section 8(b)(3) of the Act by refusing to execute the written agreement after reduction to written form pending settlement at other bargaining units, notes particularly the Trial Examiner's following finding: "In the instant case, there could be no transfer of Arizona operations elsewhere because the El Paso refinery and the manufacturing plants of the other corporations and units were totally different operations far removed from mining and smelting." In this respect he finds the facts in this case distinguishable from those in *Standard Oil Company*, 137 NLRB 690, where he dissented from the Board's decision.

[Dated August 19, 1970]

Member Brown, dissenting:

I cannot agree with my colleagues that the General Counsel has established that the Respondents demanded to impasse that Charging Party Phelps Dodge Corporation engaged in companywide bargaining in violation of the Act. In my opinion, their conclusion can be based only on a broad use of that phrase with respect to matters either not insisted upon as a condition of contract with Phelps Dodge or not really extending to all operations of the Company and its subsidiaries.

The matters at issue arose in the context of a nationwide dispute in which the Respondents struck against Phelps Dodge and three other major copper producers. In preparation for contract negotiations with these various companies, the Respondents adopted a statement of "policy goals" applicable to all four producers which included four "preconditions" for a contract. However, the negotiations with each company were separate and no details of what occurred elsewhere are before us in this case. Hence, any determination made or concession by the Respondents in any proceeding before the Board involving other employers is irrelevant herein, and determination of this case requires separation of general statements of broad principles or ultimate aims from the actual course of bargaining positions taken in the negotiations involved in the instant case.

There is no doubt that one of the "preconditions" was companywide bargaining, *i.e.*, negotiations with the employer for a single master agreement to cover all operations wherever located. It is also clear that such a request was made and contract proposals to this effect were

submitted to Phelps Dodge at the start of the 1967 negotiations, with which we are concerned. However, a mere request or submission of this nature is not itself unlawful, of course, and if the Company had acceded no problem would exist. Here, however, the Company rejected the request, and the issue, therefore, is whether the Respondents thereafter continued to insist as a condition of contract upon such companywide bargaining[8] or upon clauses of companywide application. I would find that they did not.

It is undisputed that the Company and the Respondents have bargained historically on an Arizona-wide basis, covering the open pit mining branches of the Company represented by the Respondents, and such bargaining has not included represented employees in the other operations of its subsidiaries, Phelps Dodge Refining Corporation or Phelps Dodge Copper Products Corporation. There is also no doubt about the fact that after the Charging Party rejected the requests for negotiations extending to all its locations and subsidiaries as well as demands for the particular clauses proposed, the bargaining in 1967 and 1968 continued along historical lines. Thereafter the Charging Party met with the Respondents in bargaining sessions relating only to the Arizona mining operations, with separate negotiations being held with respect to the El Paso refinery and other operations.

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[8] For purposes of this discussion, I assume that if the Respondents had engaged in the course of conduct found by the Trial Examiner and my colleagues, *i.e.*, conditioning negotiations upon companywide bargaining and agreement, the violation would be established. Since I would find that the record does not support the findings, it is unnecessary to reach the issue.

The demands advanced by and insisted upon by the Respondents herein were common expiration dates for all agreements, a limited no-strike clause which would permit employees of the Arizona mines to strike if a lawful strike were in progress at any other operation of the Company or its subsidiaries, and a "most favored nations" clause which would permit adoption of any more favorable provision included in any contract covering any other facility of the Company or its subsidiaries. The latter two proposals are referred to in the record as J. C. 2 and J. C. 45, respectively. Thereafter, the Respondents dropped these demands[9] and insisted instead upon simultaneous settlements at other bargaining units before signature of any agreement reached in the Arizona negotiations. Further, after the terms of the contract covering Arizona were agreed upon, the Respondents conditioned signature thereof upon approval by the Nonferrous Industry Conference, which took no action until informed that agreement had been reached at the Fordyce and Habirshaw plants.

According to the testimony of Mr. Uren, Director of Labor Relations for the Western Operations of the Charging Party, the proposals in J.C. 2 and J.C. 45 were referred to as "company-wide bargaining" by the Company representatives among themselves, but this designation was not used by the Union representatives. That these clauses

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[9] Mr. Uren, the Company's chief negotiator, testified that on May 31, 1967, the Respondents indicated that they realized that the Company would not agree to bargain on the broader basis and Respondents were seeking a master contract only as to the historical Arizona bargaining group. His testimony as to the meetings following that date indicates that discussion was in fact limited to provisions relative to the Arizona operations.

and the simultaneous settlement demand were those upon which the "company-wide bargaining" assertion has been based is clear both from the record of the hearing before the Board and from the trancript of the testimony before the Special Committee. Thus, Mr. Uren testified, on examination by counsel for the General Counsel:[10]

A. Those meetings [with "the Conciliation people"] occurred late in the series. The discussions revolved about the company-wide bargaining issue.

Q. What was the position of the company and what was the positions [sic] of the Unions with respect to company-wide bargaining?

A. The company took the position right at the outset . . . that no more bargaining could take place until the joint committee had removed the company-wide bargaining issue from the table.

Q. (By Mr. Ziprin [counsel of the General Counsel]) Had any of the – at any of the combined meetings were there any discussions about the Fordyce plant or the El Paso plant?

A. Yes, because these items were the heart of the company-wide bargaining issue . . . .

Q. Well to the best of your recollection tell us what was said and by whom? We do not need the exact words.

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[10] The record is replete with statements which confirm the sense in which the parties used this term, but it would serve no purpose to quote them all.

A. I don't remember who for the Unions spoke on this matter, but their position was that a settlement had to be reached at both Fordyce and El Paso before a settlement could be made in Arizona.

And again, during the course of redirect examination by counsel for the Charging Party, Mr. Uren made the following statements which are relevant on this issue:

TRIAL EXAMINER: When you use the term company-wide bargaining, are you using it in a sense of bargaining on units broader than Arizona or the entire Company, or both?

THE WITNESS: I understand it as the proposal for making the settlement in Arizona contingent on a simultaneous and satisfactory settlement at Fordyce and at El Paso.

Q. (By Mr. Boland) Mr. Uren, I hand you General Counsel's Exhibit Number 13 and ask you to point out to the Trial Examiner the two items on there which constitute the elements of company-wide bargaining insofar as it affected the Phelps Dodge Corporation?

A. They are the last two items [for simultaneous settlement] in the proposal.

Q. Now from then on were those two items which constituted the entire issue of company-wide bargaining insofar as Phelps Dodge Corporation was concerned?

A. Yes.

The testimony by this same attorney before the Special Panel is to the same effect. Thus, he stated at that time:

> When the Joint Committee presented its proposals of October 12, they included demands that all Phelps Dodge Refining Corporation issues be satisfactorily resolved and concluded simultaneously with the resolution of the Arizona mining branches issues, and that agreements at the Fordyce plant of Phelps Dodge Copper Products Corporation be satisfactorily and simultaneously concluded.
>
> There it is, and that is what we are stuck on.
>
> • • • • •
>
> The essence of this demand that we are stuck on is that in Douglas, Arizona, the unions are saying to the Phelps Dodge Corporation in its Arizona mining branches that they will not reach agreement with the Phelps Dodge Corporation until agreement has also been reached with another corporation, the Phelps Dodge Refining Corporation at El Paso, Texas, and with still another corporation, the Phelps Dodge Copper Products Corporation [sic] at Fordyce, Arkansas.

Under these circumstances, I am persuaded that a master contract covering all operations of Phelps Dodge and its subsidiaries remained a long-range objective of the Respondent, but it was not a present, fixed objective of the bargaining under consideration.[11] To conclude that any

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[11] The statements in the Respondents' authorized publications referred to by my colleagues amount to no more than indications

(continued)

of these demands – *i.e.*, a common expiration date for all agreements, a "most favored nations" clause, and/or simultaneous satisfactory settlements at all locations – are

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11 (continued) of ultimate aims, and the same is true of the testimony of members of Respondents' committee before the Special Panel, referred to at page 4 of the majority opinion. That testimony clearly is to the effect that what was being sought at this time was uniform expiration dates of various contracts covering the different units which would contain varying terms negotiated in light of the local conditions. Thus, the following exchange occurred:

> MR. MOLONY [for United Steelworkers of America]: • • • We acknowledge that we desire and we seek company-wide bargaining. We are trying to define that here. We expect to be able to achieve common economic settlements with each company for all of the properties of that company whose agreements have expired. • • •
>
> MR. REEDY [Member of Special Panel]: Mr. Molony, is what you are saying that, in terms of company-wide bargaining, you are talking about an economic package which you want to apply company-wide, and you are talking about expiration dates that would be common?
>
> The expiration dates, of course, can't have any variations. But within your economic package, do I understand that the variations here are the sort of thing they would go plant by plant, property by property?
>
> MR. MOLONY: Yes, there would be variations. I will be very candid to tell you that there are variations between the settlement we reached at Pima and the settlement we reached at White Pine.

(continued)

equatable to a demand for a single master contract applicable to all locations is a *non sequitur* for which the majority opinion supplies no rationale. Granted that both

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11 (continued)

There the thrust was to put additional moneys into wages because their wages are low relative to the industry. There was less desire to put a part of the package into pensions. In other words, when they were choosing between pensions and wages, they chose wages. They put the bulk of the money into that.

CHAIRMAN TAYLOR: You would consider that this would not be flexible?

MR. MOLONY: We are not inflexible. We are not doctrinaire in these things. We are prepared to bargain in the best sense of the word.

MR. REEDY: As I understand it, not only are you thinking in terms of separate contracts for all the various unions involved . . . but also do I understand you to say you would sign separate contracts plant by plant and property by property as long as they had common expiration dates and a common economic package?

MR. MOLONY: That we would.

MR. REEDY: And would that go into the fringes also? Would that go into various working conditions?

MR. MOLONY: Yes, they vary from plant to plant, the working conditions. I made reference to local plant issues that ought to be settled at each plant and each site prior to the signing of a contract.

Company attorney Boland recognized that many of the statements by the Union's negotiators before the Special Panel were of general application, and he so stated during the course of the hearing herein:

I would like to state the position of the charging party if I may, Mr. Trial Examiner. The proceedings

(continued)

the Charging Party and the Respondents used the term "company-wide bargaining" repeatedly, their actual meaning rather than their misuse of the term is determinative.

The Respondents argue that the matters to which they did refer in using this phrase were not unlawful.[12] Absent a no-strike clause, it cannot be said that a strike by one unit in support of another unit of employees of the same employer is necessarily unlawful, and there can be no doubt that the nature of a no-strike clause is a bargainable subject. The same is true of the expiration date of a contract, and if the Respondents wished to insist on a particular date I see nothing that could convert that subject into a nonmandatory item. A "most favored nations" clause, itself is not necessarily unlawful and may indeed be a mandatory subject of bargaining.[13] However, such clauses usually apply to terms reached with other employees rather than at other plants of the same employer. Can the fact that other plants of the same employer are involved convert

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[11] (continued)

> [before the Special Panel] were, in fact, divided as Mr. Gottesman [attorney for Respondents] says with the first day for Phelps Dodge, the second day for Kennecott, the third for Anaconda, and the fourth for AS & R. However, the people like Mr. Maloney [sic], Mr. Brubaker and other union representatives were common to all of the proceedings and made statements throughout all four days, which were applicable to the entire copper industry, to the entire copper strike.

[12] I do not pass judgment on the merit of the clauses sought but consider only whether they necessarily exceed legitimate demands.

[13] *Dolly Madison Industries, Inc.*, 182 NLRB No. 147.

such a provision to one which is *per se* a nonmandatory bargaining subject? If this question be answered in the affirmative, parity of reasoning would require a holding that any "most favored nations" clause is a nonmandatory subject of bargaining because it would be a demand for an areawide or other unit broader than the bargaining unit covered. Such a result would obviously be absurd. Finally, conditioning agreement upon approval by some higher body is an ordinary procedure and I find no reason to hold it unlawful here.

In view of the above, I see no basis for finding that the Respondents conditioned agreement upon companywide bargaining beyond the scope of the established units. Therefore, the General Counsel has not established that the Respondents violated Section 8(b)(3). I would dismiss the complaint in its entirety.

Dated, Washington, D.C., August 19, 1970.

Gerald A. Brown, Member

NATIONAL LABOR RELATIONS BOARD

[Issued July 10, 1969]

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

MARTIN S. BENNETT, Trial Examiner: This matter was heard at Phoenix, Arizona, on September 23, 24, 25, and 26 and October 3, 1968. The amended complaint, issued July 5

and based upon charges filed February 28 and June 17, 1968, by Phelps Dodge Corporation, alleges that the above-named labor organizations and their named agents had engaged in unfair labor practices within the meaning of Section 8(b)(3) of the Act.

Due to many errors in the transcript necessitating the preparation of a new transcript, ultimately on March 26, 1969, the date for receipt of briefs was set at May 19, 1969. They have been submitted by the General Counsel, the Charging Party and counsel for most Respondents.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTIONAL FINDINGS

Phelps Dodge Corporation, herein called Phelps Dodge, or PD, is a New York corporation maintaining its principal offices in New York City. It is engaged, *inter alia*, in the mining, concentrating and smelting of ores at its Western Operations in four locations in Arizona and at one in Tyrone, New Mexico, and annually ships products valued in excess of $50,000 from Arizona to other states of the United States.

The matters treated below also involve two wholly-owned subsidiary corporations which maintain their principal offices in New York City. These are Phelps Dodge Refining Corporation, herein PDRC, which is engaged in the refining of copper and operates a refinery at El Paso, Texas, and Phelps Dodge Industries, Inc., which has a wholly-owned subsidiary, Phelps Dodge Copper Products Corporation, herein PDCPC, which is engaged in the

manufacture of telephone cable and related products at Fordyce, Arkansas, and in the manufacture of wire, telephone and power cable and related products at four plants in Yonkers, New York, the latter known as the Habirshaw Division. Another wholly-owned subsidiary of Phelps Dodge Industries, Inc., until its sale on August 22, 1967, was MacKenzie-Walton Company, which was engaged in the manufacture of copper and alloy tubes and related products at Lincoln, Rhode Island.

Unless otherwise indicated all references hereinafter to Phelps Dodge will refer to the parent corporation which, with its subsidiaries, I find to be engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

I find that all of the labor organizations named in the caption of this Decision are labor organizations within the meaning of Section 2(5) of the Act.

Each of the above-named labor organizations except for Local No. 3 IBEW has been the certified or recognized representative of one or more bargaining units in the Western Operations of Phelps Dodge described above, or is a local of Steelworkers at a location where Steelworkers is the bargaining agent. Local No. 3, IBEW, is the certified bargaining representative of employees in four plants of the Habirshaw Division of Phelps Dodge Copper Products Corporation at Yonkers, New York. It is undisputed, and I find, that the respective union Respondents are majority representatives in appropriate units within the meaning of Section 9(a) and (b) of the Act.

Each of the named individual Respondents is an agent of his respective organization.

For the 1967-1968 negotiations discussed hereinafter, the many unions representing employees at the Western Operations of Phelps Dodge bargained through the medium of the AFL-CIO Joint Negotiating Committee for Phelps Dodge, herein called the Joint Committee. Each labor organization represented by said Joint Committee duly authorized said committee to represent it, except that Locals 434, 487, 523 and 1254 of the IBEW did not do so until approximately March 5, 1968.[1]

It should be noted that the labor contracts at the four Arizona facilities of the Western Operations had expiration dates of June 30, 1967 and they were struck on July 15, 1967. There was no union representation at the fifth facility at Tyrone, New Mexico, until some time subsequent to the settlement of the strike. It should also be noted that certain units of employees in the Western Operations as well as elsewhere had been represented by International Union of Mine, Mill and Smelter Workers (Mine-Mill) until July 1, 1967, when that labor organization merged into Steelworkers.

III. THE UNFAIR LABOR PRACTICES

A. The Issue

While the complaint is broadly stated, as the General Counsel puts it in his brief, "What this case is all about then is the legality of Respondent's attempt by virtue of an 8-month strike [on July 15, 1967] to compel the

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[1] The committee was formed in 1964 when local Metal Trades group invited steelworkers to join with them in joint bargaining for Arizona.

Employer to agree to multi-unit or company-wide bargaining." Counsel for Respondents puts it thusly: " . . . the legal flap between the parties was over one issue: the Union's demand for simultaneous settlements. This dispute poses the single legal issue . . . may a union in one bargaining unit refuse to sign its contract until unions in other bargaining units of the same employer have completed their negotiations? It is our contention that a union may do so, *i.e.*, that a demand for simultaneous settlements is a mandatory subject for bargaining." There is little conflict as to the facts which have been set forth accurately and extensively in the briefs of the General Counsel and the Charging Party, but rather as to the conclusions to be derived therefrom.

B. Western Operations

These are four separate operations in the State of Arizona where ores are mined and smelted. At the time of the strike, Phelps Dodge was also engaged in the development of a fifth small installation at Tyrone, New Mexico, with an unpresented complement of approximately 80. Subsequent to the settlement of the strike, certifications issued there for several units including one for Steelworkers. Several other small facilities of Western Operations are not involved herein.

Western Operations are headed by Vice President and General Manager Walter Lawson[2] and J. W. Uren, then director of labor relations. Neither has any role in labor

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[2] As distinguished from Orville Larson, International Representative of Steelworkers and spokesman for the Joint Committee.

relations at any other facility of Phelps Dodge or its subsidiaries.

At no time has there been a policy of transferring employees between any facility of Western Operations and any subsidiary of Phelps Dodge. The record also demonstrates that mining and smelting of ores are not performed at any other facility of the subsidiary corporations and that different types of equipment are respectively used. Similarly, none of the refining or manufacturing operations of the subsidiaries are performed at Western Operations. It is also clear that the skills required are different with each facility.

Suffice it to note here that Phelps Dodge Refining Corporation primarily operates a refinery at El Paso, Texas, that the Habirshaw Division manufactures power telephone and communication cables and that MacKenzie-Walton then manufactured copper tubing. The Fordyce, Arkansas, plant manufactures telephone cable.

C. Collective Bargaining History at Western Operations Prior to 1967

The 14 international unions involved herein have for many years variously represented employees at installations of Western Operations. The bargaining history has included negotiations with individual unions or locals and also consolidations of various unions.

For example, in 1964, 16 different contracts were entered into. A joint committee bargained for all four mines and this resulted in ten contracts, with six others negotiated separately by Mine-Mill and other respondents. All 1964 contracts at Western Operations had a June 30, 1967, expiration date.

Since 1952, Mine-Mill has attempted to combine bargaining for Western Operations with bargaining for the El Paso, Texas, refinery of Phelps Dodge Refining Corporation where the bulk of employees were represented by Mine-Mill; there are two other small units represented by Carpenters and IBEW. This has been uniformly resisted and rejected by Phelps Dodge. However, representatives of Mine-Mill, now Steelworkers, from El Paso have sat in during the negotiations for Western Operations and union representatives for Western Operations have sat in on El Paso negotiations.[3]

D. 1967-1968 Bargaining at Western Operations[4]

These negotiations led to one facet of the lengthy copper strike in 1967-68 involving the Charging Party and three other major copper producers.

Orville Larson, International Representative of Steel Workers requested a meeting with Phelps Dodge in behalf of Steel Workers and Mine Mill and this meeting was held on February 16, 1967. Representing Phelps Dodge were its attorney John F. Boland, Jr., and W. J. Uren, its director of labor relations. Representatives of other labor organizations dealing with Phelps Dodge in its Western Operations were present. They proceeded to examine differences

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[3] The Board has held that an employer may not object to this broad composition of a bargaining agent for negotiations as to the involved unit only. *General Electric Co.*, 173 NLRB No. 46.

[4] The bargaining history at the other corporations will be referred to as pertinent. And, in an effort to streamline an already lengthy document, some meetings of Arizona operations are not detailed herein.

between the fringe benefits of employees represented by Mine Mill and those represented by other labor organizations.

During this meeting, Bernard Greenberg of the Steelworkers' Pension and Insurance Department, as Uren uncontrovertedly testified, requested pertinent data concerning the El Paso refinery of Phelps Dodge Refining Corporation. Uren responded that this information was to be obtained only from that concern. The representatives of the Charging Party consistently took such a position in the negotiations thereafter when efforts were made to merge discussions of Western Operations with those of other units.

At this meeting Boland asked Larsen which labor organizations he represented and Larsen replied that the Joint Committee would represent all labor organizations dealing with the Charging Party in Arizona, but that there could be some withdrawals or exceptions. In the developing negotiations, the Joint Committee bargained for all labor organizations dealing with Western Operations except for four locals of IBEW which did not participate directly until March 5, 1968.

Meetings of the Nonferrous Industry Conference, herein NIC, were held in Salt Lake City between March 14 and 16, 1967. These meetings were convened pursuant to a resolution at the 1966 Constitutional Convention of Steelworkers which gave the NIC authority to reject or ratify contracts. The 1967 meeting was called by President I. W. Abel of Steelworkers and attended by representatives of Steelworkers, Mine Mill and most other international unions affected, including an international representative of IBEW.

The purpose of the meeting was to prepare demands for those organizations to submit to employers in the industry,

although voting on these provisions was by Steelworkers delegates only. The bargaining goals of the labor organizations were outlined and are set forth in a pamphlet which is in evidence, and titled "1967 Nonferrous Bargaining Policy Goals."

Various bargaining goals for 1967 were prescribed including one industry-wide wage scale in contrast to the existing pattern of contracts. They sought " . . . full Company-wide master agreements including coverage of all subsidiary units". Another objective was "a common termination date" for all agreements with "each Company". Steelworkers forwarded this document to Uren in April.

On April 14, Vice President Joseph Molony of Steelworkers and President A. C. Skinner, president of Mine Mill, wrote to the president of Phelps Dodge. They advised that (1) on February 1 Mine Mill had affiliated with Steelworkers; (2) the two unions would merge on July 1; (3) and all locals would be chartered by Steelworkers.

They referred to the reopening of contracts, proposed a meeting in May and asked that the bargaining cover all of the operations of Phelps Dodge and "your subsidiaries" where the unions represented employees. They also advised that other labor organizations representing employees of Phelps Dodge wished to participate in these joint negotiations and that the writers also desired their participation therein. As will appear, Steelworkers thereafter basically controlled the negotiations by the various affected labor organizations.

On April 21, Larson, in behalf of the Joint Committee, sent Uren a number of proposals for modification of the labor contracts. It is readily apparent that these had a scope beyond the Arizona or Western Operations of Phelps

Dodge. Thus, one of the documents contains three pages with notations in the corner of each "Bargaining Proposals PD and PDRC" which I find were Phelps Dodge and Phelps Dodge Refining Corporation.

This document lists a number of categories for negotiation and states that the specific proposals "are shown in the attached booklet entitled 1967 NONFERROUS BARGAINING POLICY GOALS." This is the identical paper prepared by the NIC in March. I find that the language of this booklet became an integral part of the bargaining proposals by the Joint Committee on the numerous listed topics.

This enclosure also specifically opened the issue of "inclusion of additional Unions in appropriate Joint Agreements." Another enclosure specifically stated that the proposals related to both Phelps Dodge and Phelps Dodge Refining Corporation.

Preceding the first general meeting on May 10, the General Counsel and the Charging Party direct attention to a meeting held on May 8 between various union officials and Phelps Dodge representatives covering one of the four Arizona operations, that at Morenci. Uren on this occasion pointed to the absence of representatives of Pipefitters and Bricklayers and President L. V. Cervantez of Respondent Morenci Metal Trades Council declared that he was representing both organizations and that all proposals made would apply to them. While Business Agent John Hedges of Respondent Bricklayers Local No. 3 professed ignorance of participation in the Council or of any representation rights at Phelps Dodge, it is conceded that Local 3 was certified at one time for a unit at Phelps Dodge and that it was a party to the 1964-67 contract between the Morenci Council and the Morenci installations of Phelps Dodge.

As for the May 10 meeting, 54 individuals attended in behalf of the unions. Larson promptly directed the attention of Phelps Dodge to the presence of three representatives from the El Paso Refinery of Phelps Dodge Refining Corporation who were allegedly prepared to bargain for that installation. Uren responded that his committee had no authority to negotiate for El Paso and would not do so. Larson responded that they would remain and also attend further meetings. They did and this presents no issue herein.

Larson submitted to Uren form letters signed by the various labor organizations affected herein which authorized the Joint Committee to bargain for them. None of these has ever been revoked.[5] Among the authorizations handed to Phelps Dodge on this occasion was one from Local 501 of Mine-Mill at the El Paso Refinery of PDRC. This was later returned by Uren on May 12 with a covering letter stating that this had no significance in the bargaining between the Joint Committee and the Arizona operations of Phelps Dodge.

During the course of this meeting, the Joint Committee told Uren that Mine-Mill and Steelworkers were advancing a no-strike clause at operations covered by the contract which provided further that it would not be effective "during any period in which United Steelworkers of America is conducting a lawful strike at any operation of the Company not covered by this agreement . . . ."

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[5] As noted, the IBEW locals did not participate in Joint Committee negotiations prior to March 5, 1968 and no authorizations were received from them.

Uren had anticipated the attempted introduction of the El Paso Refinery to the Arizona negotiations for he brought to the meeting and read the following prepared statement:

> Each participating certified or recognized bargaining representative has designated the Joint Committee as its agent for certain collective bargaining purposes in these negotiations. The Company is agreeable at this time to participating in meetings in which the Joint Committee acts as the bargaining committee for more than one certified or recognized representative, and wherein negotiations are conducted with respect to matters affecting more than one bargaining unit. The Company reserves the right, however, to withdraw at its discretion from this arrangement with respect to any bargaining unit or bargaining units; to bargain with respect to any such unit only with the bargaining committee appointed by the certified or recognized representative for that unit; and to insist that the meetings be confined to bargaining upon matters applicable to that bargaining unit.[6]

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[6] The Phelps Dodge Refining Corporation negotiations took place earlier on May 4 with employer representatives other than those representing Phelps Dodge in Arizona. Sylvain Schnaittacher, then an International representative of Mine-Mill, was present and was also present on May 10 at the Arizona meeting. This El Paso meeting was devoted to non-economic demands for that installation.

The next general meeting was held on May 31. In a discussion of non-economic issues and specifically a most favored nations clause, Uren asked what the word "Company" meant. Larson and Schnaittacher replied, according to Uren, that this meant all the operations of Phelps Dodge, including the El Paso refinery of PDRC and the MacKenzie-Walton fabricating plant of PDCPC in Rhode Island and, further, that this meant anything owned by Phelps Dodge or its subsidiaries.[7]

At a meeting on June 22, Larson referred to a prior request by President Abel of Steelworkers to the Chairman of the Board of Phelps Dodge for corporation-wide negotiators, adding that he realized Phelps Dodge did not have a legal obligation to bargain on this matter. Uren flatly rejected the request to expand the bargaining unit. Phelps Dodge submitted its first economic proposal on this occasion.

After a number of Arizona meetings in June and July, Spokesman Greenberg of the Joint Committee proposed, at a meeting on July 10 treating with Unemployment Benefits, an interplant transfer provision covering all Phelps Dodge operations in Arizona and New Mexico and also the PDRC refinery in El Paso; as noted, the Tyrone, New Mexico facility was unorganized at that time.

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[7] At a May 15 negotiating meeting at El Paso, according to Vice-President Marion Bell of that installation, Schnaittacher said that the issue of a strike turned not on local issues but on negotiations throughout the industry. Similarly, at a May 29 meeting, Schnaittacher said that the union position in El Paso was the same as in Arizona and that El Paso issues would not be resolved in El Paso.

Subsequent meetings in July were fruitless and on July 15, 1967, the Western Operations were struck, except for Tyrone. The El Paso Refinery was struck on the same day and the MacKenzie-Walton Plant was struck on the previous evening.

After the commencement of the strike, all of the labor organizations comprising the NIC elected a group known as the Nonferrous Coordinating Committee, herein called NCC. Its function was to coordinate the joint strike effort in the nonferrous industry. The group embraced a number of Steelworker officials, including Vice-President Molony; representatives of Machinists and the IBEW; and an IUE representative from a local at another concern.

Later in July, Steelworkers issued a newsletter which bears upon the nature of the strike. A story referred to Joint Bargaining Committees being established for each major copper producer and stated that each such committee "was charged with the responsibility of negotiating company-wide contracts for all unions."[8]

The Federal Mediation and Conciliation Service met with the parties on August 18 and 19. At a joint meeting on August 19, the Director of the Office of Disputes of that agency stated without contradiction that there were seven issues of the utmost importance; two of these were the interplant transfer proposal described above and another that all plants be included in the settlement.

On September 25, Steelworkers issued a document captioned "Brief Union Summary of the 1967 Copper Strike,"

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[8] On July 28, Steelworkers was advised that the sale of MacKenzie-Walton was contemplated; the sale was completed on August 22 and this removed that plant from the picture.

which had received prior approval from the members of the NCC. The paper presented a history of bargaining in the copper industry and discussed the issues of the strike. At the conclusion, the so-called major issues were listed; other issues listed were "Company-wide agreements" and "Common agreement termination dates."

On October 11, Phelps Dodge and the Joint Committee met and Larson introduced Edgar Ball, the Steelworkers representative at Fordyce as representing personnel at that installation, the Steelworkers having been duly certified in September. On October 12, Phelps Dodge and the Joint Committee met again and the Joint Committee submitted its first counter proposal to the Phelps Dodge proposal of June 22. The proposal was silent as to any master agreement for all facilities, but contained the following items:

> *Phelps-Dodge Corporation & Phelps-Dodge Refining Corporation Issues*
>
> To be satisfactorily resolved with all Unions and simultaneously concluded.
>
> *Fordyce Plant [of PDCPC]*
>
> Agreements to be satisfactorily and simultaneously concluded.[9]

Larson explained that the reference to Fordyce was a continuation of the proposal for company-wide bargaining and that Fordyce was replacing the sold MacKenzie-Walton

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[9] Similar language appeared in a written proposal made on October 13 to Phelps Dodge Refining Corporation.

plant. On the following day, Uren rejected the proposal in its entirety.

A December 12 meeting produced a new economic counterproposal from Phelps Dodge and, on December 20, the Joint Committee responded. This proposal contained language identical with that in the October 12 offer by the Joint Committee quoted above and it was rejected by Phelps Dodge on December 21.

In December, Uren speculated that the Joint Committee lacked authority to conclude a settlement and suggested that Larson arrange that representatives so endowed be introduced to the discussions. Larson in effect concurred and meetings were held in Los Angeles on January 3, 4, and 5, 1968 between Larson and Vice President Molony of Steelworkers in behalf of the Joint Committee and Uren and Vice President Walter Lawson of Western Operations.

The discussions embraced both economic and non-economic issues and at the end of the 3-day session the only economic issues outstanding were three, namely, recognition of time on strike for 1968 vacation purposes, the weekly indemnity for sickness, and a Joint Committee proposal concerning early pensions.

However, the Joint Committee representatives further insisted that a settlement at Western Operations in Arizona would be contingent on settlement at the El Paso refinery of *PDRC* and at the Fordyce, Arkansas installation of *PDCPC*. The employer representatives rejected the insertion of these two installations of the other corporations to the Arizona negotiations of PD. Vice President Molony also announced that the Joint Committee would not withdraw the company-wide bargaining issue until it knew how

this similar demand fared at the other three major copper producers.[10]

I note here that while Uren admitted that he personally then considered job security the most important noneconomic issue before the parties, the simple fact is that Respondents did press the company-wide bargaining issue.[11]

The director of the Federal Mediation and Conciliation Service arranged meetings between the parties in New York City from January 12 to 15. Vice President Molony and Larson represented the Joint Committee and Lawson and Uren appeared again for Phelps Dodge. The only subject discussed at these meetings was the removal of the Fordyce, Arkansas and El Paso, Texas installations from the negotiation for Western Operations of PD.

Phelps Dodge representatives took the position that further bargaining could not be carried out until the Joint Committee withdrew its demand for company-wide bargaining. This, the two representatives for the Joint Committee refused to do, contending, as the meetings concluded, that a settlement had to be reached at the two installations of the other corporations before a settlement could be made

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[10] Kennecott, Anaconda and American Smelting and Refining which were then also struck and at which negotiations were pending.

[11] On January 4, the Joint Committee presented a contract proposal to Phelps Dodge Refining Corporation which contained demands applicable to both Phelps Dodge and PDRC. It also contained the heretofore quoted language that Phelps Dodge and Phelps Dodge Refining Corporation issues were to be satisfactorily resolved and simultaneously concluded.

at the Western Operations of Phelps Dodge. The meetings ended on this note of complete disagreement.[12]

The secretaries of labor and commerce appointed a Special Panel to find a solution to the nationwide copper dispute and representatives of the parties in this case appeared before the panel at Washington, D.C. on January 30. The General Counsel and the Charging Party stress certain statements or admissions made on this occasion, as well as on February 2.

Vice President Molony of Steelworkers initially announced that he was spokesman for a committee [Joint Committee] which was coordinating the activities "of all the unions involved in this strike, and that for the first time there had been coordinated bargaining by Steelworkers and the merged Mine-Mill with all the other unions. He pointed to the absence of company-wide agreements in the copper industry, unlike other major industries.

He claimed that there were two major issues (1) common termination dates for all properties of each company and (2) extension of the eventual economic settlement to all plants of each company. He explained the latter by stating that any settlement at Phelps Dodge was to be applied to "all of the properties of Phelps Dodge which are involved in this strike." I find that this included the other corporations.

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[12] On January 16 and 18, Phelps Dodge Copper Products Corporation held its first meetings with Local 3, IBEW for the Habirshaw plant. And, on January 19, Steelworkers and company representatives held their initial meeting for the Fordyce plant.

Otis Brubaker of the NCC took over, directed attention to bargaining prior to the strike and complained that Phelps Dodge refused to include the El Paso refinery and it subsequently sold Rhode Island plant "in its Arizona negotiations." He later stated that "We want to bargain for all of the unions for all of the companies' properties at one table" and "We asked each company for negotiation with us of a master agreement covering all of its properties." He added that as "for the Steelworkers units involved we wanted one Steelworker contract."

After Brubaker's presentation, International Representative Russell Williams of the IBEW and a member of the NCC pointed out that 26 unions stood united in the strike.

Molony testified further that although the strikers did not seek industry-wide bargaining "the companies allege that the unions are seeking *company-wide bargaining. This is true."* [Emphasis added] He added that he doubted that anyone could persuade the strikers to settle with one property of a company and leave the others on strike and that they intended to have one contract termination date with each company for all of its struck properties "when we settle with each company." He pointed out that the companies would have to abandon any practice of bargaining plant by plant, issue by issue or union by union.

Molony was asked to explain what he meant by company-wide bargaining. He responded that Phelps Dodge had operations in Arizona, El Paso and Fordyce. He accurately predicted that the strikers would be joined by employees of the Habirshaw division in the very near future. He claimed that the strikers wanted to negotiate with anyone who could speak "for the company" and that their purpose was to obtain uniform expiration dates for the properties in the three named States. He reaffirmed his

desire for company-wide bargaining with "common economic settlements with each company for all of the properties of the company whose agreements have expired."[13]

On February 17, the Special Panel issued a report setting forth three key issues which it found to be the crux of the dispute. On March 4 all parties to the nation-wide copper dispute were summoned by the President of the United States to Washington to resume negotiations. An initial meeting was held on March 4 for company personnel for all the corporations affiliated with Phelps Dodge. Shortly thereafter, President Emmett Gordon and chief negotiator John Coulter of Phelps Dodge Copper Products Corporation together with Works Manager Robert Devlin of Habirshaw announced that their presence was not in order as this was a Phelps Dodge Corporation matter and there was no one present from its Fordyce plant or from Local 3, IBEW, the representative at Habirshaw; they duly left and the remaining parties then discussed Arizona operations.

On March 5, Phelps Dodge, PDRC and PDCPC respectively held separate meetings with the affected labor organizations. At the Arizona meeting on March 5, Larson advised Phelps Dodge that the IBEW locals were now part of the Joint Committee. Uren asked Larson to submit written authorizations of the IBEW participation and he agreed to do so. International Representative Williams of IBEW was present on this occasion and did not dispute the statement of Larson.

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[13] On February 1, Local 3 IBEW struck Habirshaw. On the previous day, Business Representative Stein had announced that he sought the same expiration date as those already on strike.

Meetings on March 5, 6, 7 and 8 were held concerning Western Operations. On approximately March 7, George Barclay, an International representative of IBEW, joined the bargaining committee. On March 8, an oral agreement was arrived at for Arizona operations. Larson shook hands with Uren and announced that all that remained to be done was to extend it to the El Paso Refinery.[14] At no time up to that point did any union representative advise Phelps Dodge that the settlement required the approval of the NIC.

On the morning of March 9, Attorney Boland encountered Vice President Molony of Steelworkers and both expressed satisfaction that an agreement had been reached. Molony then informed Boland that the agreement would be submitted to the NIC for approval. This was Boland's first knowledge of that body. Molony added that this was a Steelworkers group, that the Constitution of Steelworkers required this approval and that this was a "pattern-setting settlement". Later that day Boland was similarly advised by Elliott Bredhoff, counsel for Steelworkers, who also asked him not to publicize the settlement in order that the Conference might view the matter more objectively.

On March 11, Larson, the spokesman for the Joint Committee, appeared before the NIC and reported the March 8 agreement with Phelps Dodge. Representatives of all the affected labor organizations were in attendance. He was asked if contracts had been reached for Fordyce and Habirshaw and replied that they had not. The delegates then

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[14] Later that day an agreement was reached with Phelps Dodge Refinery Corporation in El Paso. Schnaittacher of Mine-Mill then advised Works Manager Marion Bell that the "deal" would be submitted to the council for action.

passed a resolution that the contract with Western Operations of Phelps Dodge be neither accepted nor rejected. The negotiators were directed to return to the bargaining table and obtain "uniform contract expiration dates with all properties of Phelps Dodge." They agreed to meet the following evening.

Larson informed the Phelps Dodge officials on March 11 that the settlement required NIC approval and that any rejection would not stem from the language of the agreement; he refused to elaborate on this. I note here that the very language of the resolution refutes the claim of International Representative Skinner of Steelworkers that approval was withheld for two reasons (1) no agreement on language and (2) no settlement at the other plants. I find that it was solely the second reason and, indeed, Larson's statement supports this.

On March 11, 1968, Phelps Dodge Refining Corporation, PDRC, and the unions reduced their oral agreement to writing, Schnaittacher pointing out that the NIC had not yet taken action on this.

On March 12, Phelps Dodge Copper Products Corporation, PDCPC, rejected a government proposal put forth to settle the strike. NIC met that evening, was advised that there was no settlement at Fordyce and Habirshaw and again took no action to approve the contract reached on March 8 at Western Operations in Arizona. On March 13, according to the uncontroverted testimony of Negotiator John Coulter of PDCPC, Vice President Molony of Steelworkers told him that it was Coulter and PDCPC who were keeping miners in the West [Arizona] on the street.

On March 14, the agreed upon language for the Arizona contract of PD was incorporated in a document and

approved by the parties. Members of the Joint Committee in attendance agreed to submit the proposal to their respective locals for ratification. That same evening, the PDRC agreement was reduced to writing and Schnaittacher said that he would submit it to NIC and to the locals.

On March 15, the Arizona negotiators and Molony visited the Secretary of Labor. Molony said on this occasion that the settlement was a good one and that he could recommend it, but that he believed the NIC would not approve it because it did nothing for Fordyce and Habirshaw. Late that evening, PDCPC reached agreement with Steelworkers for the Fordyce plant and with Local 3, IBEW for Habirshaw. On the morning of March 16, the NIC approved the Phelps Dodge contract for Western Operations. It similarly approved the Fordyce agreement. On March 19, a contract was executed with Local 3 for Habirshaw.

A memo of settlement for the Arizona installations was drawn up and executed on March 22 by representatives of all affiliated locals including Barclay of the IBEW. This is silent as to the El Paso plant of PDRC and the Fordyce and Habirshaw plants of PDCPC and it manifestly contemplated the continuation of 16 separate labor agreements within Western Operations.

E. Conclusions

The evidence as to what was said at meetings, admissions made before the Presidential Panel, and admissions in authorized publications amply demonstrate that after abandoning on October 12, 1967, a demand for a master agreement at all facilities, Respondent Unions sought common contract expiration dates for all facilities and a company-wide economic package; and, approaching the issue

as put by the General Counsel and Respondents, they demanded that the issues concerning Phelps Dodge Corporation and Phelps Dodge Refining Corporation were "To be satisfactorily resolved with all Unions and simultaneously concluded." and that, at the Fordyce plant of Phelps Dodge Copper Products Corporation, "Agreements [were] to be satisfactorily and simultaneously concluded."

Nor is there any question that these were demands for company-wide bargaining, for both Orville Larson of the Joint Committee and Vice President Molony of Steelworkers flaty conceded this to be the objective and, indeed, according to Molony, the key issue in the dispute.

Every time this position was taken by the Joint Committee the company representatives for Western Operations refused to enter discussions concerning bargaining units outside of Western Operations. In other words, the Employer unequivocally rejected all efforts to expand bargaining to multi-unit or company-wide bargaining and this resulted in an 8 months' strike.

The bargaining history for many years in Arizona reveals bargaining with most Respondents for those operations alone. While the record reflects that representatives of El Paso and Arizona had sat in on each other's negotiations and that the ultimate El Paso contracts roughly paralled the Arizona contracts, the fact is that the units were never crossed in actual bargaining.

Respondents have aptly argued that labor organizations have a right to engage in supportive strikes to affect the employer's superior economic power, claiming as an example that isolated strikes in the Eastern fabricating plants would be far less effective than strikes shutting down the supply of raw copper in the Arizona mines and preventing its refining in El Paso.

The General Counsel and the Charging Party point to language in *The Evening News Association*, 154 NLRB 1494, 1497, where the Board stated: " . . . we note that bargaining power of either union or employer is not a criterion used to determine the appropriateness of a bargaining unit . . . The Act nowhere says that, in determining the appropriateness of a unit, the Board shall consider relative bargaining power of the parties . . . ."

And in *District 50, United Mine Workers of America (Central Soya Company, Inc.)*, 142 NLRB 930, the issue was a demand of respondent unions that employees expressly excluded from the bargaining unit be included in the unit in bargaining negotiations. The Board there adopted the following language:

> "It is clear that the Employer continually resisted the attempt to include the specifically excluded employees before going to further subjects, but this had no effect as in each meeting the same point was raised by the Respondents . . . . The law is clear that *proposals relating to employees outside the appropriate unit are proposals not within the mandatory subjects of bargaining. A. D. Cheatham Painting Company*, 126 NLRB 997, 1002. It is unlawful to insist upon matters outside the scope of mandatory bargaining and employees not in the bargaining unit are outside the scope of mandatory bargaining. *N.L.R.B. v. Wooster Division of Borg-Warner Corporation*, 356 U.S. 342. *Anheuser-Bush Inc.*, 102 NLRB 800, 812-813. Likewise, the law is clear that *an employer has the right to confine the negotiations to the*

appropriate unit and that a union violates Section 8(b)(3) of the Act, as a matter of law, when it presses demands for a unit broader than that certified by the Board . . . ." [Emphasis added]

In a 10(j) proceeding to enjoin a strike by a labor organization insisting on bargaining for employees on a coast-wide basis where the certified unit was smaller, the District Court pointed out that the union may have been within its rights in asking the employer association to negotiate on this broader basis and the association could have accepted, "But once the Association made it unequivocally clear that it was prepared to negotiate only for the unit certified by the Board, the ILA had no right to continue to demand that the unit certification of the Board be disregarded."

In affirming this decision, the Court of Appeals noted that "The process of change not permitted by the Act is one that denies the Board its ultimate control of the bargaining unit and disrupts the bargaining process itself. This is precisely what occurs when, after the Board has decided what the appropriate bargaining unit is, one party over the objection of the other demands a change in that unit. Such a demand interferes with the required bargaining 'with respect to rates of pay, wages, hours and conditions of employment' in a manner excluded by the Act. It is thus a refusal to bargain in good faith within the meaning of Section 8(b)(3) *Douds v. ILA, et al.*, 147 F. Supp., 103, 112 (D.C.S.N.Y.) affd. 241 F.2d 278 (C.A. 2).

Another case supporting the General Counsel is *Standard Oil Company*, 137 NLRB 690, enfd. 322 F.2d 40,

(C.A. 6).[15] In that case, the employer operated four refineries in the State of Ohio, and the employees were organized in four separate units and represented by an International or one of two locals thereof. Bargaining had proceeded separately and agreements reached at three refineries. The three bargaining representatives then refused to execute these agreements until a contract was signed at the fourth installation. The Board found this to be a violation of Section 8(b)(3) and the Circuit Court enforced.

There is language in the Court decision which notes that the unions had not raised the topic of the contract at the fourth installation at the bargaining table. Respondents herein accordingly claim that the matter of "simultaneous and satisfactory settlements", by contrast, had been raised earlier in the day in the negotiations at Western Operations.

A consideration of *Standard* demonstrates that the true thrust of the decision is that the refusal to sign was predicated upon a demand extraneous to the three bargaining units, rather than its tardy introduction after agreement had been reached at those three. Stated otherwise, the issue was the making of the fourth agreement a condition precedent to signing the other three and not its timing. And the instant case is not one where a party merely seeks to *defer* negotiations in a unit pending resolution of a contract in another unit.

The sense of *Standard* is that if the placing of a demand for settlement of labor agreements on this broad basis is permissible and is a mandatory subject for collective bargaining, the entire scope of collective bargaining is drastically

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[15] Respondents' attempt to distinguish this case is treated below.

altered. The instant record demonstrates, for example, that Phelps Dodge has numerous subordinates which refine copper, manufacture various products, operate aluminum mills and plants, and have plants making electric components throughout the United States. If a demand for satisfactory resolution and simultaneous conclusion of labor agreements at all these installations is permissible and is a mandatory subject for bargaining on a nation-wide basis, the entire pattern of collective bargaining is changed. This, the weight of authority does not sanction.

This presents the decision in *U.S. Pipe and Foundry*, 129 NLRB 357, enf'd. 298 F.2d 873 (C.A. 5), cert. den., 370 U.S. 919 to which Respondents have strongly attempted to tie their position. The employer operated two plants in Alabama and one in New Jersey. Three different labor organizations, including two locals of one international, represented separate units at each installation. Each plant produced the same product, namely cast iron pipes and fittings and related products.

Separate negotiations took place at each plant, and each union sought a contract termination date identical with those at the two other facilities; the employer resisted. The Board dismissed on the ground that contract duration was a bargainable issue and that insistence by the Unions "on specific expiration dates was not evidence of bad faith bargaining . . . ."

Respondents rely on certain language by the Court which viewed the issue somewhat differently:

> Under the facts of this case viewed realistically, a common expiration date of all three contracts had a vitally important connection with the "wages, hours and other terms and

> conditions of employment" of the employees at each plant. Without a common expiration date, any union striking for a new contract on a different date might have to "bail with a sieve" *while the employer shifted its production activities to the lther plant or plants.* With a common expiration date, it is obvious that each union might be able to negotiate a more advantageous new contract for the employees represented by that union. [Emphasis added]
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> * * *
>
> In such a situation, as presented by the facts and circumstances of this case, it seems to us that the importance of collective bargaining on questions affecting "wages, hours, and other terms and conditions of employment" overrides the apparent expansion of the scope of the bargaining unit. That expansion is more apparent than real, for the very real, hard problem faced by each of the three unions, acting as the exclusive representative of the employees in its unit, is that a common expiration date for all three contracts vitally affects the ability of each union separately to bargain.[16]

The General Counsel and the Charging Party also point out, and I agree, that a crucial factor in *U.S. Pipe* relied

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[16] A dissent disagreed with the view that the action of the unions was only apparently expanding the bargaining units.

upon by the Court was that the three plants were producing the same product and that without a common termination date work could be shifted from a struck plant to the others. In the instant case, there could be no transfer of Arizona operations elsewhere because the El Paso refinery and the manufacturing plants of the other corporations and units were totally different operations far removed from mining and smelting. Thus, the "bail with a sieve" theory loses significance. Another distinction to be noted here is that Phelps Dodge did not seek different termination dates, but sought rather separate negotiations consistent with the scope of the existing established units with no conditions tied to other units.

I find, therefore, that Respondent has violated Section 8(b)(3) of the Act by, over the objection of the Charging Party, conditioning settlement for the Arizona properties of Phelps Dodge on simultaneous and satisfactory settlement of contracts in other bargaining units, thereby attempting, on this record, to engage in unlawful company-wide bargaining. It follows, therefore, that the strike in support of such demands was unlawful. See *Smith Steelworkers (A. O. Smith Corp.)*, 174 NLRB No. 41.

The record has also demonstrated that an agreement was reached for Arizona operations on March 8. But not until the following day did two representatives of Steelworkers separately advise the Charging Party that this agreement was subject to approval by NIC. This was the first time that this had been communicated to Phelps Dodge; moreover, such approval had never been a requisite in prior negotiations.

NIC then withheld approval of the contract when advised that settlement had not been reached at the Fordyce

and Yonkers properties of Phelps Dodge Copper Products Corporation. As found, the evidence preponderates that this withholding of approval was predicated upon the situation at these other properties and not upon dissatisfaction with the contract language in Arizona. I find that this independently constituted the introduction of and insistence upon a non-bargaining unit topic of non-mandatory nature to the Arizona negotiations.[17]

Respondent's conduct was further flawed herein. The oral agreement of March 8 was ultimately reduced to writing on March 14 and all concerned agreed that it accurately reflected the March 8 understanding. Yet, on March 15, although conceding that the agreement was a good one, Vice President Molony of Steelworkers announced that NIC would not sign because of the absence of contracts at the properties of Phelps Dodge Copper Products Corporation. Stated otherwise, Steelworkers refused to execute the contract prior to settlement at the other properties. Only after these contracts were reached was the contract at Arizona operations executed. This, of course, was a non-mandatory bargaining item and Steelworkers improperly conditioned its execution of the Arizona contract upon compliance with this demand.

Nor is the fact that NIC approval stems from a Steelworkers' International resolution curative. The Joint Committee had been designated to bargain in behalf of Steelworkers and the other affected labor organizations. These designations were unqualified, they were silent as to NIC approval, and no such representation had ever been made

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[17] This is distinguished from a case where ultimate ratification has been on the bargaining table.

to the Charging Party by Steelworkers. Hence, refusal to execute the contract under these circumstances breached the bargaining obligations of Steelworkers under the Act.

I find, therefore, that Respondents have further independently violated Section 8(b)(3) of the Act by (1) conditioning settlement of Arizona negotiations upon NIC approval and (2) refusing to execute the Arizona agreement after reduction to written form pending settlement at other bargaining units of affiliated corporations.

IV. THE REMEDY

Having found that the Respondents have engaged in unfair labor practices, I shall recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. In its brief, PD requests that Respondents be required to pay PD damages reflecting loss of profits and pay employees for some of the wages lost on strike. There is no warrant for such a remedy as the Board does not award damages in such cases. Cf. *I.B.E.W. v. N.L.R.B. (Presto Mfg. Co.)*, 71 LRRM 2402 (C.A.D.C.). As the main thrust of Respondents' conduct sought to cross unit bargaining lines, an appropriate remedy is recommended below.

Upon the basis of the foregoing findings of fact, and on the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Each of Respondents is a labor organization within the meaning of Section 2(5) of the Act.

2. Phelps Dodge and its subsidiaries are employers within the meaning of Section 2(2) of the Act.

3. The respective collective bargaining units of employees of PD or its subsidiaries for which Respondents have been recognized or certified are appropriate units within the meaning of Section 9(b) of the Act.

4. At all times material herein, Respondents have variously represented a majority of the employees in each of the respective appropriate collective-bargaining units above described and have been representatives of all employees in the aforesaid units for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(3) of the Act by insisting, over the objections of the employers, on company-wide bargaining beyond the scope of established bargaining units as a condition to settlement at Western Operations.

6. Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(3) of the Act by, after arrival at a contract, injecting the extraneous issue of approval by the NIC.

7. Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(3) of the Act by refusing to execute a contract after agreement thereon.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Respondent Unions, and each of them, their officers, agents, representatives, successors and assigns, shall:

1. Cease and desist from:

(a) Demanding that bargaining at Western Operations be expanded to other bargaining units of Phelps Dodge or its subsidiaries, or that any agreement reached in negotiations regarding Western Operations be contingent on agreement at other bargaining units, or resorting to strike action for such objectives, so long as Phelps Dodge insists on confining negotiations only to Western Operations.

(b) Demanding that bargaining at any unit of Phelps Dodge or its subsidiaries be expanded to other bargaining units, or that any agreement reached at one unit be contingent upon agreement at other bargaining units, or resorting to strike action for such objectives, so long as the employer insists on confining negotiations to that unit.

(c) Refusing to execute a contract after agreement upon its terms.

(d) Initially introducing, after arrival at a contract, a requirement for ratification.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Post at their respective offices and meeting halls, and all other places where Respondents are engaged in business, copies of the notice attached hereto and marked

"Appendix."[18] Copies of said notice on forms provided by the Regional Director for Region 28, shall, as to each Respondent, after being signed by the duly authorized representative of said Respondent, be posted immediately upon receipt thereof and maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to respective members are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced or covered by any other material.

(b). Furnish the Regional Director for Region 28 respectively signed copies of said notice for posting, the employers willing, in all locations where notices to employees are customarily posted.

(c) Respectively notify the Regional Director for Region 28, in writing, within 20 days from the date of this Decision what steps each Respondent has taken to comply herewith.[19]

Dated:

/s/ Martin S. Bennett
Martin S. Bennett
Trial Examiner

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[18] In the event this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words, "A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[19] In the event this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order what steps the Respondents have taken to comply herewith."

APPENDIX

NOTICE

TO ALL MEMBERS OF

Unions, which, together with United Steelworkers of America, AFL-CIO, and its affiliated locals, represent employees in the bargaining units of Phelps Dodge Corporation or its subsidiaries and to all employees of Phelps Dodge and its subsidiaries.

PURSUANT TO

THE RECOMMENDED ORDER
OF A TRIAL EXAMINER OF THE
NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT
(AS AMENDED)

we hereby notify you that:

WE WILL NOT demand that bargaining at Western Operations be expanded to other bargaining units of Phelps Dodge or its subsidiaries, or that any agreement reached in negotiations regarding Western Operations be contingent on agreement at other bargaining units, or resort to strike action for such objectives, so long as Phelps Dodge insists on confining negotiations only to Western Operations.

WE WILL NOT demand that bargaining at any unit of Phelps Dodge or its subsidiaries be expanded to other bargaining units, or that any agreement reached at one unit

be contingent upon agreement at other bargaining units, or resort to strike action for such objectives, so long as the employers insist on confining negotiations to that unit.

WE WILL NOT refuse to execute a contract after agreement upon its terms.

WE WILL NOT initially introduce, after arrival at a contract, a requirement for ratification.

ORDER MODIFYING OPINION OF U.S. COURT OF APPEALS OF THE THIRD CIRCUIT

Staley, Circuit Judge: – Upon consideration of the petition of The National Labor Relations Board for modification of opinion, the opinion of this Court filed in this case March 31, 1972, 79 LRRM 2939, be and IT HEREBY IS amended, as follows:

On page 6, sentence 2, line 3 of the first full paragraph [79 LRRM 2941, column 2, first paragraph], said sentence is deleted and the following language is substituted therefor: "The Board concedes that it did not find the Union's insistence on the four demands to be a *per se* violation of the Act; rather the Board asserts that those demands were part of an overall strategy to force the Company to negotiate on a basis broader than the established bargaining units."

On page 6, the next to last sentence, 4th line from the end of the first full paragraph [79 LRRM 2941, column 2, first paragraph], the sentence is deleted, and the following language is substituted: "As we read it, the Board's opinion finds that, even assuming the Unions' demands were mandatory subjects of bargaining, the Unions employed

those demands to achieve a non-mandatory objective, that of enlarging the bargaining unit."

On page 7, line 3 [79 LRRM 2941, column 2, second paragraph, line 13], the sentence beginning "Those demands * * *" is deleted and the following language substituted therefor: "Assuming without deciding, as the Board did, that those demands were all mandatory subjects of bargaining, as such the Unions may bargain to impasse on each or all of them."

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W. Chernish, *Coalition Bargaining*, p. 200, (University of Pennsylvania Press: Philadelphia, 1969) 5

IN THE

Supreme Court of the United States

October Term, 1972

Nos. 72-220 and 72-359

PHELPS DODGE CORPORATION,

Petitioner,

v.

AFL-CIO JOINT NEGOTIATING COMMITTEE FOR PHELPS DODGE CORPORATION, *et al.* and NATIONAL LABOR RELATIONS BOARD,

Respondents.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

AFL-CIO JOINT NEGOTIATING COMMITTEE FOR PHELPS DODGE, *et al.*, and PHELPS DODGE CORPORATION,

Respondents.

BRIEF OF KENNECOTT COPPER CORPORATION, *AMICUS CURIAE,* IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI

Kennecott Copper Corporation ("Kennecott") files this brief as *amicus curiae* in support of Petitions for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit (Nos. 72-220 and 72-359) to review the judgment of that Court entered on May 9, 1972 in *AFL-CIO Joint Negotiating Committee for Phelps Dodge, et al. v. National Labor Relations Board,* the amended opinion

dated May 25, 1972 in connection with which is reported at 459 F.2d 374.[1]

All parties to that case have consented to the filing of this brief, and copies of their letters of consent have been filed herewith.

Background of the Case

The case below arose from negotiations in 1967 and 1968 between Phelps Dodge Copper Corporation ("Phelps Dodge") and various unions representing certain of its employees in its so-called Western Operations. After the unions had first asked for and Phelps Dodge had refused joint bargaining on a company-wide basis, the unions persisted in certain bargaining demands and tactics (including conditioning settlement on simultaneous and satisfactory settlements of contracts in other bargaining units in a refinery and in fabricating plants separate from the Western Operations, and an eight-month strike in support of their demands) which the National Labor Relations Board (the "Board") found to be an unlawful attempt to negotiate beyond the scope of the properly established bargaining unit and a violation of the requirement of Section 8(b)(3) of the National Labor Relations Act (the "Act") that the unions bargain in good faith.

The Court of Appeals set aside the Board's order as not substantiated by the record and as being without a basis in law.

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1. The decision of the Court of Appeals for the Third Circuit may be found at page A-1 of the Appendix to the Petition For a Writ of Certiorari in No. 72-220, this Term.

Kennecott's Interest

Kennecott is a New York corporation. Like Phelps Dodge it carries on copper mining operations in the Western part of the United States. Like Phelps Dodge, Kennecott has a refinery, fabricating plants, and other operations which are not a part of its Western copper properties and the union-represented employees of which are in different bargaining units from those of the Western copper properties. Like Phelps Dodge, Kennecott negotiated in 1967 and 1968 with various unions with regard to certain employees of its Western copper properties. As in the case of Phelps Dodge, the unions sought throughout the negotiations in one way or another to expand the negotiations beyond the scope of the bargaining involving the Western copper properties and ultimately went out on strike for eight months in support of these demands. Like Phelps Dodge, Kennecott filed an unfair labor practice charge with the Board. The Board's Trial Examiner found the unions' conduct to have been an attempt to force Kennecott to bargain beyond the scope of the Western copper properties and to have violated Section 8(b)(3) of the Act. The unions took no exceptions to the Trial Examiner's decision, and that decision thus automatically became the decision of the Board. No litigation occurred in the Court of Appeals and the Board's order is outstanding against the unions.

While the Board's order in Kennecott's case is outstanding and while there are factual differences between this case and Kennecott's case which Kennecott believes make it unlikely that the order in Kennecott's case would be denied enforcement because of whatever may be the outcome

of this case, Kennecott, as a copper producer and industrial employer which has been shut down on strike for eight months at the same time as Phelps Dodge, has a material interest in this Court's determination of this case.

Reasons for Granting the Petitions

1. Few areas of law directly touch as many people as that of labor relations. The importance of that field is evidenced by the increasing number of such cases which find their way onto the docket of this Court.

If one were to poll the leaders of labor and industry and the labor relations press across the country with regard to what they consider the most important unresolved question in labor relations today, it would not be surprising if leading the list were the questions raised by what some call "coalition bargaining", including how far may unions properly go in forcing the merger of established bargaining units, or, put another way, in coercing an employer or employers to agree to bargain in the negotiations with regard to one established bargaining unit about terms and conditions of employment to be effective in one or more other established bargaining units.

Among the consequences turning on the answer are

—the extent to which the Board will continue to be (as the Board considers that Section 9 of the Act requires it to be) the arbiter of the appropriate unit for collective bargaining purposes;

—the extent to which the union and employees in one activity should be in a position through pressure

on the employer in that activity to impose terms and conditions of employment on another and perhaps quite unrelated activity;

—the extent to which decisions affecting the interests of the union and the employees in one activity should be taken out of the hands of those most closely concerned with the consequences of those decisions;

—the extent to which unions should be in an improved position because of disputes local to one activity to shut down a substantial part of an industry with (as happened in the case of the eight-month strike against Phelps Dodge, Kennecott and others in the copper mining industry in 1967 and 1968) significant loss of domestic production of products vital to domestic industry, loss of domestic employment and adverse impact on the country's balance of payments;[2] and

—the extent to which, through expanded bargaining units within and across industry lines, unions should be in an improved position to discourage wage differences between groups of employees without regard to differences in the other costs of and consumer demand for what they make, and thus to increase domestic inflationary pressures and the likelihood of disappearance of or export of jobs as the costs of particular products become higher than their consumer is willing to pay.

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2. *Joint Statement on Copper Panel Report By Secretaries of Commerce and Labor* (1968), printed as the appendix hereto, and Chernish, *Coalition Bargaining*, p. 200 (1969).

An important federal question calling for the guidance of this Court is at issue.

2. The decision of the Court of Appeals for the Third Circuit is at odds with the decisions of the Courts of Appeals for the Second, Fifth and Sixth Circuits.

The unions in the *Phelps Dodge* case sought expansion of the historical bargaining units and insisted on such expansion despite its rejection by Phelps Dodge. The unions' doing so was as much a violation of Section 8(b)(3) of the Act as in *Douds v. International Longshoremen's Association*, 241 F.2d 278 (2d Cir., 1957) the respondent union violated Section 8(b)(3) when it "insisted that the Association 'bargain with them for all employees engaged in longshore work in all ports from Portland, Maine to Brownsville, Texas' after the National Labor Relations Board had decided that the appropriate unit for bargaining was the Port of Greater New York and vicinity" (at 241 F.2d 281).

> ". . . The parties cannot bargain meaningfully about wages or hours or conditions of employment unless they know the unit of bargaining. That question is for the Board to decide on a petition under Section 9(c) of the Act, and its decision is conclusive on the parties. . . . although the decision may subsequently be changed.
>
> • • •
>
> "The process of change not permitted by the Act is one that denies the Board this ultimate control of the bargaining unit and disrupts the bargaining process itself. This is precisely what occurs when, after the Board has decided what the appropriate bargaining unit is, one party over the objection of

> the other demands a change in that unit. Such a demand interferes with the required bargaining 'with respect to rates of pay, wages, hours and conditions of employment' in a manner excluded by the Act. It is thus a refusal to bargain in good faith within the meaning of Section 8(b)(3)." (At 241 F.2d 282, 283.)

In *Standard Oil Company v. National Labor Relations Board*, 322 F.2d 40 (6th Cir., 1963), agreement regarding the unit at hand was reached orally and then the respondent unions announced that they would not end their strike until agreement was reached in still other bargaining units. The unions' conduct was held to have violated Section 8(b)(3) of the Act. Whether it is early (as in the *Phelps Dodge* case) or late (as in the *Standard Oil* case) in the negotiations that a union takes the position that it will not settle in the bargaining unit at hand until settlements are reached in still other bargaining units, the end result is the same—the collective bargaining which the Act is designed to encourage slams to a halt. In the one case the union reaches the point of signing and then balks until agreements are reached in other bargaining units. In the other the union anticipates that by announcing at some earlier stage that there can be no settlement at all until settlement is reached in still other bargaining units. In either event there is a refusal to bargain with an open mind with regard to the terms and conditions of employment to be applicable in the bargaining unit immediately at hand. If anything, the offense of the union which (as in the *Phelps Dodge* case) takes this adamant position at an early stage in the bargaining is the more aggravated, since bargaining is stalemated that much earlier in the game.

In *National Labor Relations Board v. South Atlantic and Gulf Coast District International Longshoremen's Association*, 443 F.2d 218 (5th Cir. 1971) the Court of Appeals for the Fifth Circuit was presented with a situation similar to that in the *Standard Oil* case. The case arose from a labor dispute in the ports of Texas in the fall and spring of 1968-69. After a long strike, the longshoremen reached an agreement on all contract issues; but they refused to execute the agreement until agreement had been reached between the employers and another unit of employees consisting of clerks and checkers. Although the longshoremen did not attempt directly to bargain about the terms of the other contract, the Board found their refusal to execute their own agreement until agreement had been reached in another unit to be a violation of Section 8(b)(3) of the Act, and the Court of Appeals for the Fifth Circuit ordered enforcement of its order.

The Court's attention is also called to *National Labor Relations Board v. International Brotherhood of Electrical Workers*, 266 F.2d 349 (5th Cir., 1959).

Kennecott's case is a classic example of the complete frustration of collective bargaining which results from this technique. In the negotiations for Kennecott's Western properties, the unions insisted upon talking about terms and conditions to be applicable to, for example, a lead and zinc producing unit different from the Western copper properties, and insisted that there could be no settlement with regard to the Western copper properties until there was a settlement with regard to the lead and zinc bargaining unit. Meanwhile in the charade bargaining going on at the lead and zinc property, the unions insisted that there

be no settlement with regard to the lead and zinc bargaining unit until they achieved the terms and conditions ultimately agreed upon in the Western copper properties. Thus the Western copper properties could reach no settlement until there was a settlement with regard to the lead and zinc bargaining unit, while at the same time no settlement could be reached with regard to the lead and zinc bargaining unit until a settlement was made for the Western copper properties. A settlement with respect to each was dependent upon a settlement with respect to the other, and as a consequence collective bargaining was effectively stalemated with regard to both.

The Court of Appeals for the Third Circuit has failed to disapprove the demands and tactics condemned by the Court of Appeals for the Second, Fifth and Sixth Circuits. Review by this Court is in order.

3. The decision of the Court of Appeals for the Third Circuit is also in conflict with observations by this Court.

This Court has made clear that insistence to an impasse on a non-mandatory subject of bargaining is a violation of the Act's good faith bargaining requirements. *National Labor Relations Board v. Borg-Warner*, 356 U.S. 342 (1958). In finding that the unions' conduct in the *Phelps Dodge* case did not violate these requirements, the Court of Appeals for the Third Circuit acted in conflict with this Court's observations in *United Mine Workers of America v. Pennington et al.*, 381 U.S. 657 (1965). There this Court spoke of the duty to bargain as a "duty to bargain unit by unit" and said that "the union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the indi-

vidual circumstances might warrant" (at 666). While the Sherman Act rather than Section 8(b)(3) of the National Labor Relations Act was there at issue, nothing in this Court's opinion suggests that there should be any difference in their construction in this respect.

Conclusion

For the foregoing reasons it is requested that a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be issued.

August 30, 1972

Respectfully submitted,

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APPENDIX

Joint Statement on Copper Panel Report by Secretaries of Commerce and Labor

(Issued February 17, 1968)

We received today the report of the special three-member panel in the prolonged copper strike. We regret that the panel had to report to us that the parties have been unable to reach agreement. However, we appreciate the dedication with which the panel worked on this matter and share their view that a basis does exist for a prompt resolution of the dispute.

The public hearings and private meetings the panel conducted with the companies and unions brought out clearly that the issue of "company-wide bargaining" is blocking a settlement.

We agree with this distinguished panel that the only way to reach a fair and speedy solution to this dispute is for the parties to discard their rigid preconditions for settlement and to begin bargaining immediately on the basis of the panel's suggestions.

The panel stated that bargaining should concentrate on the economic issues but should also include discussion of uniform expiration dates and equality of treatment within these three categories:

(1) Copper mining, smelting and refining; (2) units producing other non-ferrous metals and (3) copper wire and cable and brass fabrication.

We feel the guidelines suggested by the panel members (Professor George W. Taylor, the Rt. Rev. Msgr. George

G. Higgins and George E. Reedy) provide a sound basis for ending this dispute which is causing severe economic hardship to the parties involved and to a number of areas of the country and is having a serious, adverse impact on our Nation's balance of payments position. We strongly urge the parties to resume bargaining immediately within the framework of these suggestions. The national interest requires a prompt settlement of this dispute.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-220

PHELPS DODGE CORPORATION,
vs. *Petitioner,*
AFL-CIO JOINT NEGOTIATING COMMITTEE FOR PHELPS DODGE CORPORATION, ET AL.,
and
THE NATIONAL LABOR RELATIONS BOARD,
Respondents.

No. 72-359

NATIONAL LABOR RELATIONS BOARD,
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AFL-CIO JOINT NEGOTIATING COMMITTEE FOR PHELPS DODGE, ET AL., AND PHELPS DODGE CORPORATION,
Respondents.

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONS FOR WRIT OF CERTIORARI.

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BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

INTEREST OF THE AMICUS CURIAE.

The Chamber of Commerce of the United States of America (hereafter "the Chamber") files this brief *amicus curiae* to present its views on a case of great significance in the administration of the National Labor Relations Act.[1] Respondent Committee represented to the Board that this is "one of the most important cases—if not the most important case—to come before the Board in many years."[2] The Chamber agrees and, for this reason, submits that this Court should review the instant case.

The issue presented here—whether the Board may conclude that an attempt to obtain agreement on terms and conditions of employment to be generally applicable on a company-wide basis constitutes an impermissible effort to extend the bargaining unit—is of substantial interest to the Chamber.[3] Many of its members deal with unions which represent, as the Committee did here, employees in two or more bargaining units. This case, as the court of appeals modified opinion made clear,[4] is not limited to the particular

1. This brief is filed with the written consent of all parties in accordance with Rule 42(2) of this Court.

2. See the Committee's Brief in support of exceptions to the Board Trial Examiner's Decision, p. 1.

3. The Chamber is a business federation with a membership of more than 3800 state and local chambers of commerce and trade associations. It has an underlying membership of more than five million businessmen and business firms, many of which are engaged in commerce and subject to the Act.

4. In its initial decision, the court did not pass on the question of whether bargaining to impasse on mandatory subjects could be considered evidence of an unlawful objective to expand the bargaining unit. In the court's modified order, however, the court expressly assumed that the Committee's demands were all mandatory items and concluded nevertheless that insistence to impasse upon them was "not evidence of an attempt to merge the bargain-

factual situation here involved; it would substantially alter existing bargaining relationships in each of these other situations as well. As the Board observed in its petition for certiorari (p. 8), the decision would permit unions in numerous industries to unilaterally enlarge bargaining outside the confines of established bargaining units.[5] This is a matter of vital concern to the Chamber and its member organizations. For example, the Chamber recently appeared as an *amicus curiae* in *Allied Chemical Workers* v. *Pittsburg Plate Glass Company*, 404 U. S. 157 (1971), where it successfully requested this Court to confine mandatory bargaining to the active employees in an appropriate unit.

The Chamber has a similar interest in this case and respectfully requests this Court to consider its views.

SUMMARY OF ARGUMENT.

This case presents the Court with board issues of far-reaching legal and economic significance.

First, despite the national controversy generated by the issue of coalition or coordinated bargaining this Court has never had an opportunity to pass on the question. Because of increased union efforts to expand bargaining units, determination by this Court of the questions presented in this

---

ing of separate units." App., p. A. 13. Thus, the court not only decided that the Board's decision was not supported by substantial evidence, but was wrong on a material question of law, i.e., whether an improper bargaining object could *ever* be determined where a union does not use improper bargaining means.

5. In addition to the enlarged unit bargaining in the nonferrous metals industries, as shown here, there is a strong likelihood of such bargaining in other major industries, where, as here, there is uniform bargaining by a small number of employers. Examples of such industries are the home products, chemical and oil industries. See William M. Chernesh, *Coalition Bargaining* (University of Pennsylvania Press 1969).

case is imperative. It is apparent, as hereafter noted at pp. 3-5, that the union approach here involved, in view of its approval by the court below, is now being frequently emulated by other powerful unions in major industries. This Court should determine the lawfulness of this new and destructive bargaining tactic.

Second, the decision below alters, without legislative approval, the economic balance of power between employers and unions. As one commentator has suggested, the goal of coalition and related forms of inter-unit bargaining ". . . is to bring about unilaterally an enlargement of the scope of negotiations and of decision-making to embrace a fragmented group of bargaining units that had hitherto negotiated separately."[6] We submit that only Congress, not the courts, can determine whether such a goal is appropriate. As this Court noted in *American Ship Building Co.*, v. *NLRB*, 380 U. S. 300, 317 (1965), citing *N. L. R. B.* v. *Insurance Agents' International Union*, 361 U. S. 477, 497-498 (1960), the Board cannot ". . . introduce some standard of properly 'balanced' bargaining power, or some new distinction of justifiable and unjustifiable, proper and 'abusive' economic weapons into . . . the Act." Economic and social judgments must remain within the discretion of the legislature; they are not within the province of courts or administrative agencies.

Third, the Court below by naively and myopically viewing the Committee's demands sanctioned unilateral enlargement of the bargaining units. The effect was to judicially amend the Act, and disregard the Board's expertise in

6. Hildebrand, *Bargaining Structures and Relative Power*, Report No. 5, *Collective Bargaining: Survival in the 70's* (Industrial Research Unit, Wharton School of Finance & Commerce, University of Pennsylvania 1972), p. 10.

determining the unit in which bargaining is to take place. Moreover, in so doing, the Court below misapplied decisions of this Court, and acted in derogation of the recent decision of this Court in *Pittsburgh Plate Glass.*

ARGUMENT.

A. The Decision Below Will Lead to the Breakdown of the Stable Bargaining Units Envisaged by the Act.

The approval by the Court below of a union charade to engage in enlarged unit bargaining will lead to a breakdown of collective bargaining in numerous multi-unit companies. No longer will employers be required to bargain only within the confines of stable units established in accordance with the Act; rather, simply by following the blueprint drafted by the court below—making mandatory demands which have the intent and effect of enlarging an established unit—a union can extend negotiations to new units without the voluntary employee choice contemplated by our national labor policy. Instead of stabilizing bargaining, this technique will inexorably lead to a severe dislocation of free collective bargaining in contravention of the intent of the Act.

Indeed, a few recent examples clearly illustrate the rapidly increasing utilization of extra unit bargaining with its concommittant reigniting of long and often painfully resolved disputes regarding the appropriate bargaining unit.

Item 1: In negotiations this year between Armstrong Cork Company and a coalition of unions under the leadership of the Industrial Union Department of the AFL-CIO, the unions at numerous locations made bargaining demands,

such as a limited no strike clause, a common company-wide termination date and a "most favored nations" clause, identical to those involved in the instant case. The basis for the unions' demand was expressly stated to be the decision of the court below. The unions thus hoped to accomplish through this device the goal of "coordinated" negotiations, a goal which had already led to violence, strikes, lockouts and the disruption of a previously peaceful relationship. See the affidavit of L. J. Bibri, attached hereto as Appendix A.

Item 2: In another situation which closely parallels the instant case, a coalition composed of the International Brotherhood of Electrical Workers and four of its local affiliates sought to merge all units represented by any member of the coalition in the General Telephone Company of the Southeast into a single unit.[7] As in the instant case, this coalition has demanded, as the condition precedent to the conclusion of any contract, a common expiration of all contracts.

Item 3: In another variant of the instant theme, during recent negotiations between Shell Oil Company and the Oil, Chemical and Atomic Workers International Union, a union tried to force a unilateral merger of separately certified bargaining units for the purpose of negotiating uniform fringe benefits. In *Shell Oil Co.*, 194 NLRB No. 166 (1970), the Board found, relying on its decision here (now set aside by the court below), that the company's refusal to engage in such enlarged unit bargaining did not violate the Act. The union has now appealed that decision on the basis of the court of appeals opinion in the present case. A similar approach was utilized by the Industrial Union De-

7. See complaint issued by the Director of Region 11 of the Board in Case No. 5-CB-1279, attached hereto as Appendix B.

partment of the AFL-CIO in 1966 negotiations with Union Carbide Corporation; the I. U. D.'s goal there also, was "to force companies to negotiate major economic items on a national level." The result was strikes at eleven Union Carbide plants, which ranged from 44 to 246 days, involved 7200 hourly paid employees, the loss of $20.5 million in wages and cost the company almost $3.5 million in pretax income. 1967 Lab. Rel. Yearbk. 84, 85, 91.

As more and more unions in multi-unit companies learn the lesson taught by the court below, they also will seek to improperly enlarge their bargaining power by demanding enlarged unit bargaining. The cost will be industrial strife and economic dislocation. The Chamber submits, therefore, that the decision below is not only incorrect, but that it has severe, far-reaching economic consequences involving the very structure of the institution of collective bargaining. This Court should address itself to the legality of this serious national problem.

B. The Court Below Has Misconstrued the Controlling Decisions of This Court.

In reversing the Board, the Court below relied on four decisions of this Court.[8] Upon the basis of these cases, the Court sanctioned the enlarged-unit bargaining techniques of the Union on the ground that "the fact that a demand may have extra unit effects does not alter its status as a mandatory subject of bargaining." (App., p. A13.) In enunciating this rule, however, the Court below overlooked the fact that none of the cited decisions sanctioned unilateral enlarge-

8. *Fibreboard Paper Products Corp.* v. *N. L. R. B.*, 379 U. S. 203 (1964); *American Federation of Musicians* v. *Carroll*, 391 U. S. 99 (1968); *Teamster's Union* v. *Oliver*, 358 U. S. 283 (1959); *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, *supra*.

ment of the unit such as occurred in this case. *Fibreboard, Carroll* and *Oliver*, all arising in a subcontracting or unit preservation context, do not require a company to bargain about demands which enlarge a unit, but only to bargain about demands which, while having coincidental "extra-unit effects," concern the preservation of unit work or unit jobs.[9] Indeed, in *Pittsburgh Plate Glass*, this Court not only so limited *Fibreboard* and *Oliver* but indicated as well that "[o]ther considerations, such as the effect on the employer's freedom to conduct his business, may be *equally important*." 404 U. S. at 179, n. 19 (emphasis added).

In the instant case, the Committee did not seek to preserve unit work or jobs, but, rather, sought to enlarge the unit for its own bargaining advantage. Such an objective disregards the admonition of this Court in *Pittsburgh Plate Glass Co.* that an employer's bargaining obligation extends only "to 'terms and conditions of employment' in the unit 'appropriate to such purposes' which the union represents,"

9. In *Fibreboard*, the Court held that "replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under Section 8(b)." 379 U. S. at 215. In *Oliver* and in *Carroll*, this Court dealt with the question of whether certain combinations or agreements violated anti-trust laws. In *Oliver*, the Court found that a provision of a collective bargaining agreement regulating truck rental paid to independent truck drivers was a mandatory subject of bargaining and did not therefore violate Ohio's anti-trust law. The Court said that ". . . an inadequate rental might mean the progressive curtailment of jobs through withdrawal of more and more carrier-owned vehicles from service." 358 U. S. at 295. Similarly, in *Carroll*, this Court held that a labor agreement provision requiring an orchestra leader to charge a minimum price does not violate the Sherman Act because "the price list . . . has the objective to protect employees' job opportunities and wages from job competition of other union members . . ." 391 U. S. at 101-102.

and not to extra-unit bargaining. The area of unit determination is one which singularly involves Board expertise; its decisions are to be "accorded broad discretion." The objective must be one of grouping together only employees who have "substantial mutual interests" in order "to assure the coherence among employees necessary for efficient collective bargaining." 404 U. S. at 171-172. The decision below, it is submitted, disregards these principles.

C. The Decision Below Raises a Substantial and Recurring Question in the Administration of the Act.

Even assuming *arguendo* that the specific extra-unit demands of the Committee are mandatory bargaining subjects, such demands, when considered together with, and in the context of, the Committee's goal of company-wide bargaining, had the clear intent and effect of impermissibly enlarging the bargaining unit and of merging all of the Company's operations into a single unit. As the Court of Appeals for the Second Circuit pointed out in *N. L. R. B.* v. *General Electric Co.*, 418 F. 2d 736, 760 n. 15 (1969), *cert. den.*, 397 U. S. 965 (1970), in determining that an employer's overall conduct of negotiations was unlawful even though his individual actions considered alone were proper:

> . . . A policy . . ., innocent in and of itself, can in context become a vital part of an illegal overall pattern of conduct.

Similarly, in this case, the Committee's demands, when considered *in toto*, unilaterally enlarged the bargaining

unit.[10] The Committee's willingness to bargain separately at each location, as the Board recognized, was a sham. The items it demanded, if made part of a collective bargaining agreement, would necessarily have precluded separate unit negotiations, and would have effectively merged all of the Company's plants into a single overall unit. Before agreeing, for example, on a wage adjustment at any one plant in its operation, the Company would be constrained to consider its effect on all units; under the "most favored nation" clause, a more favorable wage adjustment would automatically be incorporated into a contract covering all other represented units. Similarly, if the proposed limited no strike clause were adopted, the Company could never make a decision to accept a strike at any one location without at the same time determining whether it could accept a strike at all of its other locations. To the same effect, the common expiration date demand would, as a practical

10. In enacting Section 9 of the Act, Congress established a detailed procedure for collective bargaining. An established bargaining unit cannot be altered by unilateral action of one of the parties, but only through mutual consent or through utilization of the Board's representation procedures. *International Longshoremen's Association (New York Shipping Association, Inc.)*, 118 NLRB 1841, 1843, enforcement denied on other grounds, 277 F. 2d 681 (D. C. Cir. 1960); *N. L. R. B.* v. *Montgomery Ward & Co., Inc.* 399 F. 2d 409, 412 (7th Cir. 1968); *Douds* v. *I. L. A.*, 241 F. 2d 278, 282-283 (2nd Cir. 1957); *Central Soya Company Inc.*, 142 NLRB 930, 939; *Textile, Inc.*, 119 NLRB 1792, 1797-1798. Absent agreement, neither employer nor union "may attempt to force on the other an enlargement or merger of an established unit or units." *Shell Oil Co., supra*, Accord: *N. L. R. B.* v. *Hess Oil & Chemical Corp.*, 415 F. 2d 440, 444 (1969), cert. denied 397 U. S. 916 (1970); *The Standard Oil Company*, 137 NLRB 690, 691 (1962) enforced 322 F. 2d 40 (6th Cir. 1963). Indeed the antitrust, as well as the labor, laws are "clearly set against employer-union agreements seeking to prescribe labor standards outside the bargaining unit." *United Mine Workers* v. *Pennington*, 381 U. S. 657, 668 (1965). In sum, once the duty to bargain exists, change which ". . . denies the Board . . . ultimate control, of the bargaining unit . . . disrupts the bargaining process." *Douds* v. *I. L. A.*, *supra* at 283.

matter, merge negotiations at all Company locations. Moreover, the Committee expressly refused to execute an agreement in any one unit until agreement was reached in all other pending negotiations. In short, under the decision below, the Company would no longer be negotiating on a unit-by-unit basis as required by Section 9 of the Act, but, as a matter of absolute economic necessity, would be compelled to negotiate with the unions on a company-wide basis.[11]

CONCLUSION.

This case raises a recurring and substantial problem in the administration of the Act. It is an issue which, unless resolved by this Court, is likely to engender further severe economic dislocation. By considering this question, the Court's time will not be misspent. The petitions for writs of certiorari should be granted.

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11. This result is wholly inconsistent with this Court's repeated warning that it "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and its object and policy." *Pittsburgh Plate Glass*, 404 U. S. at 185, citing, *inter alia Mastro Plastics Corp.* v. *N. L. R. B.*, 350 U. S. 270 (1956).

APPENDIX A.

AFFIDAVIT

STATE OF PENNSYLVANIA
COUNTY OF LANCASTER } ss:

I, L. J. Bibri, being first duly sworn on my oath depose and state as follows:

1. I am Vice President and Director of Employee Relations of the Armstrong Cork Company, Liberty and Charlotte Streets, Lancaster, Pa., 17604. I was employed as Director of Employee Relations during both the current and the 1970 contract negotiations when our company was confronted by a coalition of unions representing all 8 of our unionized plant locations under the leadership of the Industrial Union Department of the AFL-CIO.

2. On various dates between April 13 and August 2, 1972 plant managers at our Macon, Georgia, Jackson, Mississippi, Fulton, New York, Braintree, Massachusetts and Beaver Falls, Pennsylvania plants received from local unions representing these respective plants the following contract demands:

a) There shall be no strikes in the bargaining unit covered by this agreement during the life of this agreement; provided that this no-strike clause shall not be effective during any period in which employees are conducting a lawful strike in any other bargaining unit of the Company.

b) The termination date of this agreement be the same as the termination dates in other agreements negotiated by the Company in 1972.

c) When, during the term of this agreement, the Company negotiates an agreement covering any other

bargaining unit of the Company, the Union shall have the right, upon demand, to have any provision of said agreement incorporated into this agreement.

In support of these demands, the unions at Macon, Jackson and Fulton presented identical documentation citing in each instance the Third Circuit Court of Appeals decision of *AFL-CIO v. Joint Negotiating Committee for Phelps Dodge v. NLRB*, 79 LRRM 2939 (3rd Cir. 1972), petition for certiorari filed in Case Nos. 72-220 and 72-359 (S. Ct. Oct. term, 1972). At the other locations the same demands were presented in substance as part of basic contract proposals. While documentation was not offered, the demands were described as being of the same orgin as those listed above.

3. This tactic was merely a refinement of the demands made by the coalition in the 1970 negotiations, prior to the *Phelps-Dodge* decision, where, under the direction of the Industrial Union Department, separately certified unions at these plants located throughout the United States presented the Company with uniform demands for changes in the pension and insurance supplements in effect at those locations. In the negotiations which ensued, it became obvious to me, and the records so support, that the IUD's strategy was (a) to fail to reach agreement on both the supplement and the basic contract upon the expiration date at each of the plants in turn, and (b) to offer to work without a contract until all of the plant agreements in the company had expired so as to effect, if necessary, a multi-plant shut-down.

4. IUD representatives were frequently present at contract negotiations at each separate location. As a result of these union tactics, prolonged multi-plant strikes occurred at our plants as follows:

a) Macon, Georgia, September 3, 1970 to November 4, 1970;

b) Beaver Falls, Pennsylvania, August 15, 1970 to November 14, 1970;

c) Fulton, New York, August 19, 1970 to November 16, 1970;

d) Braintree, Massachusetts:

1. Production unit, August 25, 1970 to November 10, 1970;

2. Maintenance unit: August 26, 1970 to November 16, 1970;

e) Jackson, Mississippi: September 1, 1970 to November 7, 1970.

I have read the above affidavit consisting of this page and two other pages. It is true and correct to the best of my knowledge.

/s/ L. J. Bisai

APPENDIX B.

UNITED STATES OF AMERICA

Before the National Labor Relations Board Region 11.

	Cases Nos.
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and ITS LOCALS 289, 2035, 1431 and 1087	11-CB-359
	11-CB-359-2 (formerly 5-CB-1279)
and	11-CB-359-3 (formerly 10-CB-2141);
GENERAL TELEPHONE COMPANY OF THE SOUTHEAST	11-CB-359-4 (formerly 26-CB-725)

ORDER CONSOLIDATING CASES, COMPLAINT, AND NOTICE OF HEARING

It having been charged in Cases Nos. 11-CB-359, 11-CB-359-2 (formerly 5-CB-1279), 11-CB-359-3 (formerly 10-CB-2141) and 11-CB-359-4 (formerly 26-CB-725), by General Telephone Company of the Southeast, herein called General Telephone, that International Brotherhood of Electrical Workers, AFL-CIO, and its Locals 289, 2035, 1431 and 1087, herein collectively called Respondents, have engaged in and are engaging in unfair labor practices effecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U. S. C. Sec. 151, *et seq.*, herein called the Act, and the General Counsel of the National Labor Relations Board, herein called the Board, by the undersigned Regional Director for the 11th Region, having duly considered this matter, and it being deemed necessary to

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consolidate said cases in order to effectuate the purposes of the Act and to avoid unnecessary costs or delay,

IT IS HEREBY ORDERED, pursuant to Section 102.33 of the Board's Rules and Regulations, Series 8, as amended, that these cases be, and they hereby are, consolidated.

Upon said charges the General Counsel of the Board, on behalf of the Board, by the undersigned Regional Director, issues this Complaint and Notice of Hearing pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended.

1.

A copy of the charge in Case No. 11-CB-359 filed on June 29, 1972, was duly served upon International Brotherhood of Electrical Workers, AFL-CIO, herein called Respondent International, and International Brotherhood of Electrical Workers, Locals 1087, 289, 2035 and 1431, herein called Respondent locals 1087, 289, 2035 and 1431, respectively, by registered mail on June 29, 1972. A copy of the charge in Case No. 11-CB-359-2 (formerly 5-CB-2179) filed on June 28, 1972, was duly served upon Respondents by registered mail on June 29, 1972. A copy of the charge in Case No. 11-CB-359-3 (formerly 10-CB-2141) filed on June 28, 1972, was duly served upon the Respondents by registered mail on June 29, 1972. A copy of the charge in Case No. 11-CB-359-4 (formerly 26-CB-725) filed on June 29, 1972, was duly served upon Respondents International Brotherhood of Electrical Workers, Locals 1087 by registered mail on June 29, 1972, and Respondents Local 1431, Local 2035, and Local 289 on June 30, 1972.

2.

On July 27, 1972, the General Counsel of the Board, pursuant to Section 102.33 of the Board's Rules and Regula-

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tions, Series 8, as amended, ordered that the aforesaid Case Nos. 5-CB-2179, 10-CB-2141, and 26-CB-725 be transferred to and continued in the 11th Region of the Board as Case Nos. 11-CB-359-2, 11-CB-359-3, and 11-CB-359-4, respectively.

3.

General Telephone is and has been at all material times herein, a Virginia corporation maintaining its principal office in Durham, North Carolina, with plants and exchanges in the States of North Carolina, Virginia, South Carolina, Tennessee, West Virginia, Alabama and Virginia, where it is engaged as a public utility in providing local and long distance telephone service to customers in each of these states.

4.

General Telephone has an annual gross income in excess of $1,000,000, and it provides toll call services valued in excess of $50,000 annually.

5.

General Telephone is, and has been at all times material herein, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

6.

The Respondent International and Respondent Local 289, Local 1431, Local 2035 and Local 1087, are, and have been, at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

7.

All employees assigned to General Telephone's plant, commercial, engineering, accounting, budget, data coordination, marketing and traffic departments in its General Office and North Carolina Division, constitute a unit ap-

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propriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. These employees perform line man, switch man and installation work in connection with General Telephone's, providing and maintaining telephone service for customers within the State of North Carolina.

8.

All employees assigned to General Telephone's commercial and engineering departments in its Charles Town-Romney Districts of the West Virginia-Virginia Division, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. These employees perform line man, switch man and installation work in connection with General Telephone's providing and maintaining telephone service for customers within the State of West Virginia.

9.

All employees assigned to General Telephone's traffic and commercial departments in its South Carolina Division, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. These employees perform line man, switch man and installation work in connection with General Telephone's providing and maintaining telephone service for customers within the State of South Carolina.

10.

All employees assigned to General Telephone's traffic and commercial departments in its Tennessee Division constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. These employees perform line man, switch men and installation work in connection with General Telephone's

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providing and maintaining telephone service for customers within the State of Tennessee.

11.

At all times since on or about 1955, and continuing to date, Local 289 has been a representative of the employees in the unit described in paragraph 7 above for the purposes of collective bargaining, and by virtue of Section 9(a) of the Act has been, and is now, the exclusive representative of all the employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

12.

At all times since on or about November 21, 1958, and continuing to date, Local 2035 has been a representative of the employees in the unit described in paragraph 8 above for the purpose of collective bargaining, and by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

13.

At all times since on or about April 1, 1968, and continuing to date, Local 1431 has been a representative of the employees in the unit described in paragraph 9 above for the purposes of collective bargaining, and by virtue of Section 9(a) of the Act has been, and is now, the exclusive representative of all the employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

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14.

At all times since on or about 1957, and continuing to date, Local 1087 has been a representative of the employees in the unit described in paragraph 10 above for the purposes of collective bargaining, and by virtue of Section 9(a) of the Act has been, and is now, the exclusive representative of all the employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

15.

The following-named individuals occupy the positions in the labor organizations shown opposite their respective names, and are, and have been at all times material herein, agents of the respective labor organizations, within the meaning of Section 2(13) of the Act:

Thomas J. Murphy	— International Representative
Larry Kellaris	— International Representative
Arthur Holland	— President, Local 289
John Tyree	— President, Local 1087
Vernon W. Webster, Jr.	— President, Local 2035
E. J. Johnson	— President, Local 1431

16.

Since on or about March 5, 1972, and continuing thereafter, Respondents, despite the history of separate recognition of the respective locals in the respective units described above, and over the pretest of General Telephone, have insisted, with threat of strike, that General Telephone recognize a System Council as the exclusive collective bargaining representative of all the employees in the units described in paragraphs 7, 8, 9 and 10, above.

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17.

Since on or about June 1, 1972, and continuing thereafter, Respondents have insisted, with threat of strike, upon a common expiration date for any collective bargaining agreements covering the employees described in paragraphs 7, 8, 9 and 10, above, in conjunction with their insistence on recognition of a System Council as described in paragraph 16, above.

18.

Since on or about June 1, 1972, and continuing thereafter, Respondents have insisted with threat of strike, that no collective bargaining agreement would be consummated for any one of the units described in paragraphs 7, 8, 9 and 10, above, unless agreements that all such units contained provisions for common expiration dates.

19.

Since on or about July 27, 1972, Respondents have engaged in a strike to require General Telephone to agree to their demands as set forth in paragraphs 16, 17 and 18, above.

20.

On or about May 22, 1972, Respondent Local 289 and General Telephone agreed upon all the terms and conditions of a collective bargaining agreement covering the employees in the unit described in paragraph 7, above, and General Telephone requested that Local 289 execute a written contract incorporating such agreement.

21.

Since on or about June 14, 1972, Respondent Local 289 has refused, and continues to refuse, to execute the collective bargaining agreement referred to in paragraph 20,

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above, because it failed to provide for recognition of a System Council.

22.

By the acts described above in paragraphs 16, 17, 18, 19 and 21, above, the Respondents, and each of them, did refuse, and are refusing, to bargain collectively with an Employer, and thereby did engage in, and are engaging in, unfair labor practices affecting commerce within the meaning of Section 8(b)(3) and Section 2(6) and (7) of the Act.

23.

The acts of the Respondents described in paragraphs 16, 17, 18, 19 and 21, above, occurring in connection with the operation of the Employer described above in paragraphs 3, 4 and 5, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

24.

The acts of Respondents described in paragraphs 16, 17, 18, 19 and 21, above, constitute unfair labor practices within the meaning of Section 8(b)(3) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 22nd day of August, 1972, at 10 a.m., E. D. T., in the Federal Courtroom, United States Post Office, Durham, North Carolina, a hearing will be held before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Statement of Standard Procedure in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

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You are further notified that pursuant to Section 102.20 and Section 102.21 of the Board's Rules and Regulations, Series 8, as amended, you shall file with the Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four copies of an answer to the said complaint within 10 days from service thereof, and that unless you do so, all the allegations in the above complaint shall be deemed to be admitted to be true and may be so found by the Board.

Dated at Winston-Salem, North Carolina, this 29th day of July, 1972.

/s/ REED JOHNSTON
Reed Johnston, Regional Director
National Labor Relations Board
Region 11
1624 Wachovia Building
Winston-Salem, North Carolina 27101

FILE COPY

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-220

PHELPS DODGE CORPORATION, *Petitioner*,
v.
AFL-CIO JOINT NEGOTIATING COMMITTEE FOR PHELPS DODGE, et al., *Respondents*.

No. 72-359

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,
v.
AFL-CIO JOINT NEGOTIATING COMMITTEE FOR PHELPS DODGE, et al., *Respondents*.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

When this case began, it appeared to pose a legal issue of great significance to the future course of collective bargaining in the United States. But neither the Board nor the court below reached or decided that issue. Nevertheless, in No. 72-220, the Company seeks to have this Court decide that issue. In No. 72-359, the Board seeks to have this Court rule upon a different legal theory, one which formed no part of the Board's decision, which made its first appearance in the Board's appellate brief, and which was not considered

by the court below because it constituted an effort by Board counsel at *post-hoc* rationalization of the Board's decision.

The rocky litigation path leading to this confused denouement can be retraced quickly.

I

This case arose out of an effort by unions representing employees in several of the Company's bargaining units to secure a synchronization of their separate collective bargaining agreements to the limited extent necessary to enable employees in the several units to strike at the same time. The unions hoped to end a history of impotence resulting from fragmented bargaining power: whenever employees in one unit were free to strike for improved benefits, their fellow employees in other units were under contractual no-strike prohibitions and thus could not strike in their support. In an effort to gain a modicum of bargaining power, the unions sought contractual modifications which would preserve the statutory right of employees in each unit to strike in support of their fellow employees in other units. *Houston Insulation Contractors Association* v. *NLRB*, 386 U.S. 664, 668-669 (1967).

The Company filed charges with the Board alleging that the unions' demands for synchronization were non-mandatory subjects of bargaining, and that by insisting upon them to impasse and striking in support of them the unions were violating Section 8(b)(3) of the Act, 29 U.S.C. § 158(b)(3). While the unions believe that their demands were clearly mandatory subjects of bargaining,[1] there is no ques-

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[1] *Houston Insulation Contractors Association* v. *NLRB*, *supra*, *NLRB* v. *Insurance Agents International Union*, 361 U.S. 477 (1960); *U.S. Pipe and Foundry Co.* v. *NLRB*, 298 F.2d 873 (5th Cir. 1962); *Lynchburg Foundry Co.* v. *NLRB*, — F.2d —, 80 LRRM 2415, (4th Cir. 1972); *NLRB* v. *Peter Cailler Kohler Swiss Chocolate Co.*, 130 F.2d 503, 505-506 (2d Cir. 1942); *NLRB* v. *General Drivers*, 225 F. 2d 205, 210 (5th Cir. 1955); *NLRB* v. *Landis Tool Co.*, 193 F.2d 279, 282-283 (3rd Cir. 1952); *Dolly Madison Industries*, 182 NLRB No. 147, 74 LRRM 1230 (1970).

tion but that the ultimate resolution of this issue is one of great importance.

The Board, however, did not reach or decide this issue. Instead, it found as a fact that the unions in the Western Operations had also made *another* demand—that the Company discuss with them the benefits to be extended to the non-Western bargaining units—and held that *this* demand was violative of Section 8(b)(3).[2]

The unions petitioned for review, contending that the Board's factual finding was wholly without record support. The court below agreed (A11-A13):

> "We find that the Board's opinion and order are not substantiated by the record . . .
>
> * * * * *
>
> "Separate negotiations were conducted at each of the company's units. No bargaining was conducted at any unit with regard to wages, terms, or employment conditions at other locales.
>
> * * * * *
>
> "We conclude from this record that in the Arizona

---

[2] "The Trial Examiner found, and we agree, that one of the Respondents' primary objectives throughout the course of bargaining at the Charging Party's Arizona operations was to obtain agreement on terms and conditions of employment to be applicable generally on a companywide basis, and that the strikes conducted by the Respondents throughout the Charging Party's facilities were intended, in substantial part, to force the Charging Party to accede to the Respondents' demands for such a companywide agreement. The record as a whole amply supports this conclusion.

* * * * *

"Accordingly, we find that the Respondents, by demanding that the Charging Party engage in companywide bargaining, beyond the scope of established bargaining units, and by striking in support of its demands, has violated Section 8(b)(3) of the Act." (A15, A19).

> negotiations petitioner unions did not insist that Phelps Dodge agree to terms and conditions of employment to be applicable generally to other bargaining units and that they did not strike to enforce such a demand."[3]

In their brief to the court below, Board counsel had sought to justify the Board's decision on an alternative ground. Conceding that perhaps there was no record evidence for the Board's finding that the unions in Western Operations had sought to negotiate for other units, Board counsel reasoned that the decision ought to be sustained anyway, for the "practical effect" of what the unions had actually done was no different from what the Board had erroneously found them to have done. Specifically, Board counsel argued that where unions in separate negotiations seek the same benefits, and each declares that it will continue striking in support of the others, the "practical effect" is the same as if one union had insisted upon negotiating the benefits for all units.

The court below expressly refrained from adjudicating this claim—the same claim which the Board now advances to this Court—because it was not the basis for the Board's decision but constituted merely "counsel's *post hoc* rationalizations for agency action" (A10):

> "We reiterate in order to emphasize the fact that the Board opinion and order must stand or fall upon the findings of fact and conclusions of law contained therein. In the instant case, counsel for the Board has advanced an argument in support of the Board's order

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[3] The Board's petition (p. 10) twice states that it is "undisputed" that the Unions "insist[ed] that the terms negotiated in one unit be extended to the other units." On the contrary the unions have disputed this throughout, and the court below found the record devoid of evidence of any such insistence (A11-A13).

that is really a rationalization of the Board's decision.[6] We may not consider such an argument. '[A]n administrative order cannot be upheld unless the grounds upon which the agency acted * * * were those upon which its action can be sustained.' SEC v. Chenery Corp., 318 U.S. 80, 95 (1943). We cannot accept counsel's *post hoc* rationalizations for agency action. NLRB v. Metropolitan Life Insurance Co., 380 U.S. 438 (1965).

---

[6] The Board's brief argues that the effect of the demands made by the unions would be that employees in other units would receive the same terms and conditions as the employees in the Western Operations. The argument contends that, as a practical matter, the result would be the same as if the unions had negotiated for other units in the Western Operations negotiations. Since such an instance would have been violative of the Act, the Board's counsel contends that a course of conduct that is designed to achieve the same result is likewise violative. This was clearly not the import of the Board's decision, which found that the unions did seek to negotiate about terms and conditions in other units."

Finally, the court below reached the issue which the Board had avoided—whether the demands admittedly advanced by the unions were mandatory subjects of bargaining —and held that they were (A12-A13).

The Board petitioned for modification of the decision below, requesting that the court delete its holding that the unions' demands were mandatory subjects of bargaining. The Board's petition explained (p. 5):

> "The issue as to whether the demands . . . are mandatory or non-mandatory subjects of bargaining under the Act is a significant one, whose outcome may have a substantial impact on labor relations throughout the country. If, as we submit, the Board did not specifically pass upon, nor did Board counsel brief, that issue, we urge the Court to defer definitely deciding the matter until the Board has done so."

The Court below granted the Board's petition, and modified its opinion by deleting the holding that the unions' demands were mandatory subjects of bargaining (A12-A13).

II

As the foregoing account of the history of this litigation makes clear, the court below did not reach or decide the issues presented in either of the petitions for certiorari.

The lone question presented in the Company's petition (No. 72-220) is whether the unions' demand for simultaneous settlement is a mandatory subject of bargaining. But as the Board's petition for modification acknowledged, "the Board did not specifically pass upon, nor did Board counsel brief, that issue," and although the court below originally resolved that issue in the unions' favor, it granted the Board's request to modify its opinion and delete that holding.

The lone question presented in the Board's petition (No. 72-359) is whether the Board may invalidate assumedly mandatory bargaining demands where the practical effect of such demands is the same as if the unions in one unit had sought to negotiate terms applicable to other units. (Board petition, pp. 2, 11-12). The court below expressly refused to reach or decide that issue, declaring that it was not the basis for the Board's decision and constituted merely a *post-hoc* attempt by Board counsel to rationalize a Board decision actually predicated upon a different ground (A10, and n. 6 thereat).

CONCLUSION

The only issue actually decided below was a factual one: whether the unions in Western Operations had insisted that the Company bargain with them about non-Western units. The Board found that they had, but the court below held this finding to be without evidentiary support. This "substantial evidence" ruling hardly warrants this Court's attention and, not surprisingly, neither petition seeks review of it.

As to the more important issues which hovered over this case throughout but emerged undecided, we can add nothing to the point made so persuasively by the Board in its petition for modification below (p. 5): "[W]e urge the Court to defer definitively deciding the matter until the Board has done so."

Respectfully submitted,

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IN THE

Supreme Court of the United States

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vs.

AFL-CIO JOINT NEGOTIATING COMMITTEE FOR PHELPS DODGE, ET AL., AND PHELPS DODGE CORPORATION,
Respondents.

RESPONSE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA TO BRIEF IN OPPOSITION

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Respondents.

RESPONSE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA TO BRIEF IN OPPOSITION.

The Chamber of Commerce of the United States of America, as *amicus curiae*, previously demonstrated that, as stated in the Board's petition (p. 12), "[t]he question whether unions, by the kind of tactics utilized here, may

expand the scope of collective bargaining beyond established bargaining units is an important issue in the administration of the Act." The Respondents, while acknowledging that this question is one of "great significance to the future of collective bargaining in the United States", nevertheless oppose certiorari on the sole ground that the court below did not reach that issue. Br. in Opp., pp. 1, 6. This assertion is based on several misconceptions which require a brief response.

1. The court below decided more than a mere factual dispute. It directly sanctioned the Board-disapproved device of enlarging unit bargaining by "conditioning settlement of negotiations [in one bargaining unit] . . . upon simultaneous and satisfactory settlement of contracts in other bargaining units." App., p. A-2. The court admittedly did not rule in its modified opinion—as the Board similarly had not—on the separate question of whether the Unions' demands involved mandatory or non-mandatory subjects of bargaining. Rather, the court concluded, regardless of the disposition of *that* issue, the effect of the Unions' "over-all strategy" and "parallel action" was permissible. App., pp. A-7, A-8. It is *this* decision which constitutes the fundamental disagreement between the Board and the court, and is the critical question which the instant petitions now present to this Court.

2. The decision below, notwithstanding the asserted variance accorded to its precise holding, has caused a severe dislocation in well established labor-management relations. See Bd. pet., pp. 12-13; Phelps Dodge pet., pp. 15-16; Chamber br., pp. 5-7. That fact is not disputed. The Court of Appeals has enunciated a rule which, if permitted to stand, will have wide-spread ramifications on the future course of collective bargaining in multi-unit companies throughout the nation. Such an issue clearly is "beyond the academic or the

episodic." *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, 74. It is for this reason that, the Chamber again submits, the present case warrants the attention of this Court.

Respectfully submitted,

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